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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 344

ARTHUR L. BELL, INDIVIDUALLY, AND AS AN ASSOCIATE OF AND DIVISION SUPERINTENDENT OF "MANKIND UNITED," ETC., ET AL., PETITIONERS,

vs.

R. B. HOOD, THEODORE CRUISE, PHILIP BOWSER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 20, 1945.

CERTIORARI GRANTED OCTOBER 22, 1945.

No. 10790

United States

Circuit Court of Appeals

For the Ninth Circuit.

ARTHUR L. BELL, individually, and as an Associate of and Division Superintendent of "Mankind United", a Voluntary Association, for and in behalf of said "Mankind United" and The Associates thereof; Maude Askew, Eugene Wadsworth Brown, J. Fred Burkey, Lawrence Cook, A. Ray Elsea, Jacob Gloeckler, Bay Burns Sharp, Shanna Jakeman, Pauline Kelso, Max Theodore Miller and Homer G. Wilcox,

Appellants,

vs.

R. B. HOOD, THEODORE CRUISE, PHILIP BOWSER, GEORGE M. LANGDON, WILLIAM GIESON, EUGENE GREER, J. H. ANGELL, J. SECRIST, JOHN ROCHE, MALCOM C. POWRIE, CECIL C. HUMPHREYS, A. F. SCHEIMERHORN, WILLIAM BRANIGAN, JOHN DOE WOLFE, DON C. SWANSON, CARL B. SHERMAN, EARL K. ADAMS, HOWARD H. DAVIS, ROBERT T. PUGH, EDWARD A. FURBUSH, O. WILSON FARRELL, DENNIS G. SMITH, HERBERT J. NUBISH, ROBERT O'KEEFE, EARL P. STATEN, ROBERT MONTGOMERY, NEWELL WILLIAMS, RICHARD DOE DEVINE, RICHARD DOE BULLFRASS, JOHN C. NORRIS, WALT BUTLER, MIKE CASSIDY, PAUL J. O'FARRELL, JOHN W. SCHALLER, LOUIS D. WINE, MERLE ARMSTRONG, JOHN PHILIP MANTON and FRANCIS JOHN GOOD,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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Rotary Colorprint, 55 Eleventh Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and for the Southern District of California, Central Division

No. 2850—Y Civ

ARTHUR L. BELL, Individually, and as an Associate of and Division Superintendent of "MANKIND UNITED", a Voluntary Association, for and in behalf of said "MANKIND UNITED" and The Associates thereof; MAUDE ASKEW, EUGENE WADSWORTH BROWN, J. FRED BURKEY, LAWRENCE COOK, A. RAY ELSEA, JACOB GLOECKLER, BAY BURNS SHARP, SHANNA JAKEMAN, PAULINE KELSO, MAX THEODORE MILLER and HOMER G. WILCOX,

Plaintiffs.

vs.

R. B. HOOD, THEODORE CUISE, PHILIP BOWSER, GEORGE M. LANGDON, WILLIAM GIESON, EUGENE GREER, J. H. ANGELL, J. SECRIST, JOHN ROCHE, MALCOM C. POWRIE, CECIL C. HUMPHREYS, A. F. SCHEIMERHORN, WILLIAM BRANIGAN, JOHN DOE WOLFE, DON C. SWANSON, CARL B. SHERMAN, EARL K. ADAMS, HOWARD H. DAVIS, ROBERT T. PUGH, EDWARD A. FURBUSH, O. WILSON FARRELL, DENNIS G. SMITH, HERBERT J. NUBISH, ROBERT O'KEEFE, EARL P. STATEN, ROB-

ERT MONTGOMERY, NEWELL WILLIAMS, RICHARD DOE DEVINE, RICHARD DOE BULLFRASS, JOHN C. NORRIS, WALT BUTLER, MIKE CASSIDY, PAUL J. O'FARRELL, JOHN W. SCHALLER, LOUIS D. WINE, MERLE ARMSTRONG, JOHN PHILIP MANTON, FRANCIS JOHN GOOD, ONE DOE, TWO DOE, THREE DOE, FOUR DOE, FIVE DOE, SIX DOE, SEVEN DOE, EIGHT DOE, NINE DOE and TEN DOE,

Defendants.

COMPLAINT FOR DAMAGES FOR FALSE IMPRISONMENT AND UNLWAFUL SEARCH AND SEIZURE

Come now the plaintiffs and complain against the defendants and each of them and allege:

I.

Jurisdiction of this Court is founded upon a Federal question arising under the Fourth and Fifth Amendments to the Constitution of the United States; and Title 5, U. S. Code: Sections 300 and 300a, as [2] more fully appears hereinafter. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00). Jurisdiction of this Court is founded upon the Federal question involving the rights of the individual plaintiffs and each of them to be free from deprivation of liberty without due process of law by false and unlawful imprisonment; and the Constitutional rights of all of the plaintiffs to be free

from unreasonable searches and seizures. All of the persons who participated in the acts to be hereinafter complained of, with the exception of the defendant Merle Armstrong, were at the time of the commission of said acts, and at all times herein have been, officers of the Federal Government, to-wit, Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice, and claim to have acted under and by virtue of the Provisions of Sections 300 and 300a of Title 5, U. S. Code aforesaid, and have acted in concert as is more particularly set forth hereinafter.

II.

All the individual plaintiffs aforesaid are, and at all times herein have been, citizens of the United States.

III.

The plaintiff, Arthur L. Bell, is and for over eight years has been a resident of the City and County of San Francisco, in the State of California, and has at all times herein been the Division Superintendent for the Pacific Coast Division of "Mankind United"; that the plaintiff, the California Association of "Mankind United" is, and for the last eight years has been, a voluntary association consisting of a varying number of persons, and consists now in the State of California of many thousands of persons, all of whom are citizens of the United States and residents of the State of California, and in whose behalf, as well as in the behalf of the individual plaintiffs herein, this suit is brought.

IV.

That said "Mankind United", a voluntary association, was organized and exists for the following purposes, to-wit: to eliminate [3] illiteracy, poverty and war; to establish world-wide economic equality, based on the principles promulgated by Christ Jesus, including particularly the Golden Rule of Brotherly Love, "one" world family, irrespective of race, color, nationality, religion, education or profession.

V.

That at all times herein, and for a period of 8 years, the plaintiff Arthur L. Bell has been the Division Superintendent for the State of California of said "Mankind United"; and the duties of said plaintiff as such Division Superintendent have been and are as follows: The supervision and coordination of the efforts of all co-workers of the Pacific Coast Division of "Mankind United", in the promulgation of its teachings and the formation of part of a world-wide audience of 200,000,000 persons to whom a thirty day program of "proofs" of the practicability thereof might be safely and systematically released.

That said plaintiff Arthur L. Bell files this suit herein both for himself individually and as an associate and as Division Superintendent of said "Mankind United" for and in behalf of himself as said associate and Division Superintendent, and for and in behalf of all of the associates of said "Mankind United"; the persons constituting said voluntary association being so numerous as to make it

impracticable to bring them all before the Court as parties plaintiff herein, and the appearance of the plaintiff, Arthur L. Bell, herein in their behalf, and the representation by the plaintiff Arthur L. Bell, of said class will insure the adequate representation of all of said associates, and the character of the rights sought to be enforced in behalf of said class is joint and/or common as will appear more particularly hereinafter.

In addition all of the plaintiffs herein assert a right to relief both jointly and severally in respect to, and arising out of, the same transaction, occurrence or series of transactions or occurrences, and questions both of law and of fact common to all of the plaintiffs; with respect to all of the defendants joined in the within [4] action, the plaintiffs assert against them both jointly and severally a right to relief in respect to, and arising out of, the same transaction, occurrence or series of transactions or occurrences; and questions of law and of fact common to all of the defendants will arise in said action.

VI.

That plaintiff, Maude Askew, resides in the City of San Diego, State of California, and has resided therein for more than four years last past, and that she is a co-worker of "Mankind United";

That plaintiff, Eugene Wadsworth Brown, resides in the City of Los Angeles, State of California, and has resided therein for more than four years last-past, and that he is a co-worker and a Bureau Manager of "Mankind United";

That plaintiff, J. Fred Burkey, resides in the City of Oakland, State of California, and has resided therein for more than four years last past, and that he is a co-worker and a Bureau Manager of "Mankind United";

That plaintiff, Lawrence Cook, resides in the City of San Diego, State of California, and has resided therein for more than four years last past, and that he is a co-worker of "Mankind United";

That plaintiff, A. Ray Elsea, resides in the City of Los Angeles, State of California, and that he is a co-worker and a Bureau Manager of "Mankind United";

That plaintiff Jacob Gloeckler resides in the City of Denair, State of California, and has resided therein for more than four years last past, and that he is co-worker of "Mankind United";

That plaintiff Bay Burns Sharp resides in the City of Fresno, State of California, and has resided therein for more than four years last past, and that he is a co-worker and a Bureau Manager of "Mankind United";

That plaintiff Shanna Jakeman resides in the City of Los Angeles, State of California, and has resided therein for more than four years last past, and that she is a co-worker of "Mankind United";

[5]

That plaintiff Pauline Kelso resides in the City of San Diego, State of California, and has resided therein for more than four years last past, and that she is a co-worker of "Mankind United";

That plaintiff Max Theodore Miller resides in the City of Mountain View, State of California, and has

resided therein for more than four years last past, and that he is a co-worker and a Bureau Manager of "Mankind United";

That plaintiff Homer G. Wilcox resides in the City of San Diego, State of California, and has resided therein for more than four years last past, and that he is co-worker and a Bureau Manager of "Mankind United";

VII.

That, with the exception of defendant Merle Armstrong who is on the Police Force in the City of Los Angeles, the defendants, and each of them, were on or about the 18th day of December, 1942, and at all times herein have been, Special Agents of the Federal Bureau of Investigation of the United States Department of Justice, and, on information and belief, their headquarters are as follows: Los Angeles, San Francisco, Oakland and San Diego, California.

VIII.

On the 17th day of December, 1942, the individual plaintiffs herein were indicted by the Grand Jury for the Southern District of California, charged with a violation of Section 34, Title 50, U. S. Code, as appears more particularly in the indictment on file with the Clerk of the above-entitled Court, No. 15759.

IX.

That on or about the 17th day of December, 1942, defendant R. B. Hood and each of the other defendants, unlawfully conspired with each other to act beyond their authority as said Federal Bureau of Investigation agents and police officer respectively,

and agreed that they would abridge the Constitutional rights of the plaintiffs as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States to be free from the deprivation of liberty and property [6] without due process of law, and to be free from unreasonable searches and seizures, and agreed unlawfully to simultaneously, in the early morning of December 18th, 1942, search the homes of the individual plaintiffs herein without any warrants of search or seizure, and unlawfully to seize the papers, documents and effects of said plaintiffs and of "Mankind United", and falsely to imprison the individual plaintiffs by unlawfully arresting some of the individual plaintiffs without a warrant of arrest and unreasonably to delay the taking of all of the individual plaintiffs before a committing officer, in order to effectuate the unlawful searches and seizures aforesaid.

X.

That thereafter, and on the 18th day of December, 1942, as will appear more particularly hereinafter, the defendants and each of them, in order to carry out the terms and conditions of the illegal conspiracy aforesaid, and solely for the purpose of carrying out said terms and conditions, did arrest and imprison the individual plaintiffs herein, and did search the homes of said plaintiffs, and seize and carry away books, papers and effects of said individual plaintiffs and of said "Mankind United".

XI.

That in accordance with the terms of said conspiracy and in the furtherance of the same and for

the purpose of carrying out its terms and conditions, the said defendants committed the following acts, all of which were and are beyond the scope of the authority of said defendants and in violation of the Constitutional rights of the plaintiffs as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States, to the damage to the plaintiffs as follows:

(a) That at about 7:30 o'clock in the morning of the 18th day of December, 1942, said defendants, Theodore Cruise, Philip Bowser, George M. Langdon, William Gieson, Eugene Greer, One Doe and Two Doe, did break open the doors of the residence of plaintiff Arthur L. Bell and enter upon his premises and announced to said plaintiff that he was under arrest. That they did not produce an order or warrant of [7] arrest or search and seizure, nor did they have either a warrant of arrest or search warrant, and said defendants proceeded without the consent and against the will of said Arthur L. Bell to search the entire premises in which he lives. That after searching the entire premises and leaving the same in great confusion and disorder, said defendants took this plaintiff from the premises but did not bring him before any committing officer until the hour of two o'clock in the afternoon although holding him in custody during all of said time at his residence; and they did take from his premises thousands of documents, papers, records and other property belonging to "Mankind United" and entrusted to the keeping of this plaintiff, as well as many private documents, papers and other personal properties belonging to this plaintiff and his wife;

also the sum of approximately Eight Thousand Five Hundred ($8,500.00) Dollars in funds of said "Mankind United".

That the property taken from said premises, in addition to the money in question, included personal documents, automobile insurance policies, private papers of this plaintiff's wife, records and documents for two safe-deposit boxes, thousands of receipts for monies expended, letter files and thousands of other papers and documents.

That said defendants, Theodore Cruise, Philip Bowser, George M. Langdon, William Gieson, Eugene Greer, Doe One and Doe Two, remained upon the premises from approximately 8:00 o'clock in the morning to 2:00 o'clock in the afternoon, and removed from this plaintiff's premises twelve large cartons and packages containing "Mankind United" property entrusted to this plaintiff by said "Mankind United" and necessary for the past and present records of the same; the complete contents of said cartons and packages this plaintiff was not informed of at that time, nor since, by said defendants, nor was plaintiff permitted by said defendants to take a list of the same other than the number of cartons removed from the premises.

That during the time when he was falsely imprisoned by the defendants in his premises as aforesaid plaintiff, Arthur L. Bell, was not permitted to see his attorney although said attorney was waiting in the hall outside the door, and did so wait for over five hours, [8] said attorney having been refused permission by these defendants to enter said home of the plaintiff; nor was plaintiff allowed to have

any counsel although questioned by the said defendants for the purpose of obtaining evidence against him in connection with the indictment above set forth, nor was plaintiff allowed to speak with, or obtain advice from, any other person, nor to use his telephone, in all to his damage as herein set forth.

(b) That at about the hour of 7:30 in the morning of the 18th day of December, 1942, said defendants Carl B. Sherman and Earl K. Adams entered the premises of plaintiff Maude Askew, and announced that she was under arrest and stated that they were agents of the Federal Bureau of Investigation; they did not show her a warrant of search and seizure, but falsely imprisoned her upon said premises and stated to her that they did not need a warrant for search and seizure so long as they were making an arrest, and declared that they would assume responsibility for searching said premises and, against the will and without the consent of said plaintiff, did search and take from said premises a large number of documents, papers and other property belonging to "Mankind United" and entrusted to the keeping of this plaintiff, Maude Askew, as well as many private documents, papers and other personal property belonging to this plaintiff, and said defendants did not take her before a committing magistrate, but did take her to the city jail in the City of San Diego, State of California, and there kept her imprisoned until noon Saturday, without arraignment before any committing magistrate whatsoever, in all to her damage as herein set forth.

(c) That at about the hour of 7:30 in the morn-

ing of the 18th day of December, 1942, defendants Edward A. Furbush and Three Doe and Four Doe did enter upon the premises of plaintiff Eugene Wadsworth Brown, showing to him cards of identification as agents of the Federal Bureau of Investigation and stating that this plaintiff was under arrest, producing what they called a "bench warrant" under a secret indictment and showing same to this plaintiff. That said defendants did not [9] produce any warrant of search or seizure, and stated that they had no such warrant, that such a warrant was not necessary as long as they had a warrant for plaintiff's arrest. That said defendants proceeded against the protest and will of this plaintiff, to search the premises in which he lives. That said defendants then proceeded to seize and take away papers and documents, together with one or more moving picture films, the property of "Mankind United" and entrusted to this plaintiff. That upon their entering the premises of said plaintiff Eugene Wadsworth Brown, defendants kept the said Brown as their prisoner in said premises, did not permit him to leave and illegally detained him for the space of approximately 7½ hours, during which time, and until 3:00 or 3:30 P.M. of said day, they neglected and refused to take this plaintiff before a committing officer in accordance with law, and illegally held him as a prisoner and searched his entire premises without permitting him to be present, except for a very short time. When said plaintiff was taken by said defendants to the county jail he was not brought before a committing officer until 4:00 p.m.

That during all of the time that said plaintiff was in the county jail he was held incommunicado by said defendants or their agents, not allowed to telephone anyone or to see a lawyer. That said defendants ransacked the entire home of this plaintiff. That they not only took articles in full view, but opened and searched drawers, shelves and forced one or more locked drawers. That after this plaintiff was taken to the county jail, the defendants remained on his premises without right or warrant and, on information and belief, continued to make an extensive search thereof, in all to his damage as hereinafter set forth.

(d) That at about the hour of 7:30 in the morning of the 18th day of December, 1942, defendants Cecil C. Humphreys, A. F. Scheimerhorn and William Branigan, entered the premises of plaintiff J. Fred Burkey, and announced that he, the said Burkey, was under arrest. That said defendants did not exhibit any warrant of arrest, or any warrant for search or seizure of this plaintiff's premises. That against the protests of this plaintiff and without his consent, they proceeded to [10] search the premises in which he lives and took therefrom a large quantity of documents, records and papers belonging to "Mankind United" and entrusted to this plaintiff. That said defendants refused to permit said plaintiff, J. Fred Burkey, to leave his home, and illegally imprisoned him in said premises without taking him before a committing officer for arraignment; that for the space of more than five hours said defendants detained this plaintiff in said premises while

they searched every room of the same and took therefrom a large number of pamphlets, records and other documents, some belonging to "Mankind United" and legally in this plaintiff's custody, and others belonging to him personally, in all to his damage as hereafter set forth.

(e) That at about the hour of 7:30 in the morning of the 18th day of December, 1942, defendants, O. Wilson Farrell, Dennis G. Smith and Herbert J. Nubish, forced their way into plaintiff Lawrence Cook's home, and announced that he was under arrest, producing a document which they claimed was a warrant of arrest. That said defendants did not produce any warrant for search or seizure. That instead of removing said plaintiff from the premises and arraigning him before a committing officer, against the consent and will of this plaintiff, said defendants searched the entire premises in which he lives, seizing and carrying away great numbers of books, papers and other articles belonging to "Mankind United" entrusted to this plaintiff's care by said "Mankind United", also a great many documents, papers and other personal property belonging to this plaintiff, and forcibly detained said plaintiff, *and forcibly detained said plaintiff* upon said premises after he had been placed under arrest for approximately six hours, in all to his damage as hereinafter set forth.

(f) That at about the hour of 7:30 in the morning of the 18th day of December, 1942, defendants, J. H. Angell, J. Secrist, John Roche and Malcolm C. Powrie, special agents of the Federal Bureau of

Investigation, and Merle Armstrong, a member of the Los Angeles Police Force, did with force and arms enter the premises of plaintiff A. Ray Elsea, and produced what was purported to be a copy of a warrant of arrest, [11] the exact statements therein are unknown to this plaintiff who was not permitted to have a copy of same. That against this plaintiff's will, and without his consent, said defendants proceeded to search the home in which this plaintiff lives with his wife, and to seize all of his books and papers indiscriminately helping themselves to papers, documents and effects belonging to this plaintiff as well as those entrusted to him by "Mankind United", and carried large bundles away from said premises. Included with the papers taken were all of this plaintiff's wife's records concerning a completion of income tax and sales tax returns which it was necessary for her to immediately prepare and file. That said defendants falsely imprisoned this plaintiff in his home from the hour of approximately 7:00 A.M. until approximately 2:00 P.M. That, instead of removing said plaintiff from the premises and arraigning him before a committing officer, said defendants forcibly detained this plaintiff upon said premises after he had been placed under arrest for approximately seven hours, in all to his damage as hereinafter set forth.

(g) That at about the hour of 7:30 in the morning of the 18th day of December, 1942, defendants, John C. Norris, Walt Butler, Mike Cassidy and Paul J. O'Farrell, did enter upon the

premises of plaintiff, Jacob Gloeckler, showed this plaintiff cards of identification as agents of the Federal Bureau of Investigation, forced their way into this plaintiff's house and announced that said plaintiff was under arrest. They did not produce any warrant of arrest, nor did they produce any warrant of search and seizure. That said defendants proceeded, against the consent and will of this plaintiff, to search the premises in which he lived. That said defendants also informed this plaintiff and his wife that they knew their rights, that it was not necessary for them to have either a warrant of arrest or a warrant of search and seizure, and that they were acting under instructions. That after searching the entire premises these defendants seized this plaintiff and took him from the premises together with a great number of documents, papers and records of "Mankind United" entrusted to this [12] plaintiff's care, also a great number of documents and personal property belonging to said plaintiff and his wife. That these defendants forced, under threat, this plaintiff and his wife to fill out a questionnaire in their own handwriting and sign the same, and under threat said defendants dictated the answer this plaintiff and his wife were to make to said questionnaire; that said defendants took said questionnaire away with them. That for approximately four and one-half hours this plaintiff was illegally imprisoned by said defendants upon his premises without being taken before a committing officer, in all to his damage as hereinafter set forth.

(h) That at about the hour of 7:30 in the morning of the 18th day of December, 1942, defendant, Howard H. Davis did enter upon the premises of plaintiff, Bay Burns Sharp, announced that this plaintiff was under arrest and showed him what was purported to be a warrant of arrest, but did not present to this plaintiff any warrant of search and seizure. That said defendant took this plaintiff to the United States Marshal's office in the Federal Building, Fresno, California. That this plaintiff took with him a brief case and had in his pockets records concerning his position with the "Mankind United" Organization and which had been entrusted to him by "Mankind United"; that both the brief case and the papers in plaintiff's pockets were taken from him at the United States Marshal's office. That among the property taken from this plaintiff's pockets and withheld were account books of great value to this plaintiff, but of no value to anyone else, and a name file which contained a complete list of names and addresses of persons affiliated with his work. That this plaintiff has been informed and believes, that without any further exhibition of warrant of search and seizure, after plaintiff's removal to prison, at least seven agents of the Federal Bureau of Investigation, including some of the defendants herein, searched his entire premises, took a great number of documents, papers, records and other personal property therefrom, in all to his damage as hereinafter set forth.

(i) That at about the hour of 7:30 in the morning of the 18th [13] day of December, 1942, defendants, Robert T. Pugh and others, forced an entrance upon the premises of plaintiff Shanna Jakeman. That this plaintiff was in bed, being quite ill. That said defendants pushed their way inside and told plaintiff that they had come to arrest her, stating that they were Federal Bureau of Investigation agents. That said defendants did not produce a warrant of arrest, nor a search and seizure warrant, but proceeded to search plaintiff's home. That after this plaintiff had dressed herself to go with them, said defendants required plaintiff to remain in the living room. That while in her home said defendants presented to this plaintiff a paper and told her that if she did not sign same, they would get a warrant and it would be hard on her. That, under duress, this plaintiff signed said paper. That said defendants remained in this plaintiff's home for about five hours searching same behind closed doors, after searching the living room where plaintiff was compelled to *sat y*. That during all of said period of time this plaintiff was falsely imprisoned by said defendants and detained in her home without being taken before a committing officer. That said defendants seized and took away papers and documents belonging to this plaintiff including her private letters and other personal property; that among the articles taken by said defendants were charts, pictures and other matter being personal property in connection with plain-

tiff's study of "Mankind United". That after thoroughly searching the entire premises, said defendants took this plaintiff to an office on Spring Street, where they asked her a great many questions. That this plaintiff was kept in the Spring Street office for approximately one and one-half hours, at which time she became so faint and ill from lack of nourishment that she could no longer answer questions, and said defendants took her to the county jail in the City of Los Angeles without having been first arraigned before any committing officer, in all to her damage as hereinafter set forth.

(j) That at about the hour of 7:30 in the morning of the 18th day of December, 1942, defendants John Doe Wolfe and Don C. Swanson, did enter the premises of plaintiff Pauline Kelso, announced that [14] that plaintiff was under arrest. That they, John Doe Wolfe and Don C. Swanson, against the consent and will of said plaintiff, proceeded to search the premises in which this plaintiff lives. That, although plaintiff protested against such search and seizure, said defendants produced no warrant for search and seizure. That having falsely imprisoned her in said premises from 7:30 in the morning until in the afternoon, they took this plaintiff, together with the papers, documents and effects which they had seized, to the San Diego County jail where she was confined without being taken before a committing officer until noon Saturday, in all to her damage as hereinafter set forth.

(k) That at about the hour of 7:30 o'clock in the morning of the 18th day of December, 1942,

defendants, John W. Schaller, Louis D. Wine, Four Doe and Five Doe, did, with a revolver force their entrance into the premises of plaintiff Max Theodore Miller, and announced that this plaintiff was under arrest. That said defendants did not produce any warrant of arrest, nor did they produce any warrant of search and seizure. That said defendants proceeded, without the consent and against the will of this plaintiff, to search the premises on which he lives. That upon the United States Postman delivering a registered letter addressed to this plaintiff, said defendants seized the same, opened it and removed the contents. That said defendants seized and carried away from this plaintiff's premises a great number of documents belonging to "Mankind United" and entrusted to the care of said plaintiff; said defendants also took away documents and other personal property belonging to this plaintiff and his wife, including the sum of One Thousand Two Hundred One and 85/100 ($1,201.85) Dollars. That the property taken from said premises by said defendants included, in addition to the money in question, a strong box, together with personal documents, private papers of this plaintiff's wife and all other documents and records which said defendants found in the strong box, including automobile insurance policies. That said defendants searched the private purse of plaintiff's wife, removing and seizing therefrom receipts, including a money order receipt, also a booklet entitled, [15] "The Law and Gospel of Eco-

nomies". That said defendants remained upon this plaintiff's premises from approximately 7:30 A.M. until 12:30 P.M., during all of which time this plaintiff was illegally held a prisoner by said defendants without being taken before a committing officer for arraignment, in all to the damage of said plaintiff as hereinafter set forth.

(1) That at about the hour of 7:30 in the morning of the 18th day of December, 1942, defendants, Robert O'Keefe, Earl P. Staten, Robert Montgomery, Newell Williams and Adam Wolf, did force their way into the premises of plaintiff Homer G. Wilcox, showed this plaintiff cards of identification as agents of the Federal Bureau of Investigation, and announced that plaintiff was under arrest. That they produced a warrant of arrest and stated that that permitted them to search anything they wanted to on plaintiff's premises. That said defendants, against the consent and will of this plaintiff, searched his home. That said defendants seized and took away papers and documents, together with moving picture films, stereopticon slides, maps, etc. That after such search and seizure these defendants seized this plaintiff and took him, together with all the papers, documents seized, from the premises. That during all the time said defendants were carrying on their search and seizure of plaintiff's premises and property, this plaintiff was illegally held a prisoner in his home without being taken before a committing officer for arrignment, in all to his damage as hereinafter set forth.

XII.

That the plaintiffs, and all of them, have been for many years residents of the State of California, and were teachers and ministers preaching the gospel of "Mankind United". That they were handling the business affairs of said "Mankind United" in their respective territories. That they have no other home or occupation other than as such ministers and teachers within the State of California and that there was no reason or probability or likelihood of any of them leaving the State of California, which facts were well known to [16] the defendants who had secretly made careful investigations in connection with all of the actions and doings of said plaintiffs for a long period of time last past; but that said arrests that were herein made without warrants of arrest were made pursuant to the conspiracy aforesaid of said defendants.

XIII.

That in no instance aforesaid did the defendants, or any of them, have a search warrant to search the premises of any of the plaintiffs, nor had such a search warrant been issued.

XIV.

In each instance aforesaid where an arrest was made without a warrant of arrest, the defendants had no reasonable or any ground to believe that the plaintiff so arrested was guilty of a felony cognizable under the laws of the United States, nor had a violation of Title 50, Sec. 34, taken place; nor, as aforesaid, was there any likelihood that

any of the individual plaintiffs would escape before a warrant could be obtained for his arrest; nor, as aforesaid, were any of the individual plaintiffs taken immediately before a committing officer.

XV.

That as the result of said actions of the defendants, the plaintiffs have suffered the following damages:

(1) Plaintiff, "Mankind United" by the disruption of its business has suffered damages in the sum of One Hundred Thousand ($100,000.00) Dollars.

(2) Plaintiff, Arthur L. Bell, individually, by reason of the search of his home and the seizure of his books, papers and effects, has suffered damages in the sum of Five Thousand ($5,000.00) Dollars; that by reason of his false imprisonment this plaintiff has suffered damages in the sum of *Fifth* Thousand ($50,000.00) Dollars; and by reason of the deprivation of his Constitutional rights, mental pain and anguish and suffering, injury to his reputation, said plaintiff has suffered damages in the sum of One Hundred Thousand ($100,000.00) Dollars; in all to his damage One Hundred Fifty-five Thousand ($155,000.00) Dollars.

(3) Plaintiff, Maude Askew, by reason of the breaking into [17] and entering of her premises by the defendants aforesaid, has suffered damages in the sum of Five Thousand ($5,000.00) Dollars; that by reason of her false imprisonment, this plaintiff has suffered damages in the sum of Twenty Thou-

sand ($20,000.00) Dollars; and by reason of the deprivation of her Constitutional rights, mental pain, anguish, suffering and injury to her reputation, plaintiff has suffered damages in the sum of Fifty Thousand ($50,000.00) Dollars; in all to her damage Seventy-Five Thousand ($75,000.00) Dollars.

(4) Plaintiff, Eugene Wadsworth Brown, by reason of the breaking into and entering of his premises by the defendants aforesaid, has suffered damages in the sum of Five Thousand ($5,000.00) Dollars; that by reason of his false imprisonment, this plaintiff has suffered damages in the sum of ($20,000.00) Dollars; and by reason of the deprivation of his Constitutional rights, mental pain, anguish, suffering and injury to his reputation, plaintiff has suffered damages in the sum of Fifty Thousand ($50,000.00) Dollars; in all to his damage Seventy-five Thousand ($75,000.00) Dollars.

(5) Plaintiff, J. Fred Burkey, by reason of the breaking into and entering of his premises by the defendants aforesaid, has suffered damages in the sum of Five Thousand ($5,000.00) Dollars; that by reason of his false imprisonment this plaintiff has suffered damages in the sum of Twenty Thousand ($20,000.00) Dollars; and by reason of the deprivation of his Constitutional rights, mental pain, anguish, suffering and injury to his reputation, plaintiff has suffered damages in the sum of Fifty Thousand ($50,000.00) Dollars; in all to his damage Seventy-five Thousand ($75,000.00) Dollars.

(6) Plaintiff, Lawrence Cook by reason of the

breaking into and entering of his premises by the defendants aforesaid has suffered damages in the sum of Five Thousand ($5,000.00) Dollars; that by reason of his false imprisonment, this plaintiff has suffered damages in the sum of Twenty Thousand ($20,000.00) Dollars; and by reason of the deprivation of his Constitutional rights, mental pain, anguish, suffering and injury to his reputation, plaintiff has suffered damages in the [18] sum of Fifty Thousand ($50,000.00) Dollars; in all to his damage Seventy-five Thousand ($75,000.00) Dollars.

(7) Plaintiff, A. Ray Elsea, by reason of the breaking into and entering of his premises by the defendants aforesaid, has suffered damages in the sum of Five Thousand ($5,000.00) Dollars; that by reason of his false imprisonment, this plaintiff has suffered damages in the sum of Twenty Thousand ($20,000.00) Dollars; and by reason of the deprivation of his Constitutional rights, mental pain, anguish, suffering and injury to his reputation, plaintiff has suffered damages in the sum of Fifty Thousand ($50,000.00) Dollars; in all to his damage Seventy-five Thousand ($75,000.00) Dollars.

(8) Plaintiff, Jacob Gloeckler, by reason of the breaking into and entering of his premises by the defendants aforesaid, has suffered damages in the sum of Five Thousand ($5,000.00) Dollars; that by reason of his false imprisonment, this plaintiff has suffered damages in the sum of Twenty Thousand ($20,000.00) Dollars; and by reason of the deprivation of his Constitutional rights, mental pain, an-

guish, suffering and injury to his reputation, plaintiff has suffered damages in the sum of Fifty Thousand ($50,000.00) Dollars; in all to his damage Seventy-five Thousand ($75,000.00) Dollars.

(9) Plaintiff, Bay Burns Sharp, by reason of the breaking into and entering of his premises by the defendants aforesaid, has suffered damages in the sum of Five Thousand ($5,000.00) Dollars; that by reason of his false imprisonement plaintiff has suffered damages in the sum of Twenty Thousand ($20,000.00) Dollars; and by reason of the deprivation of his Constitutional rights, mental pain, anguish, suffering and injury to his reputation, plaintiff has suffered damages in the sum of Fifty Thousand ($50,000.00) Dollars; in all to his damage Seventy-five Thousand ($75,000.00) Dollars.

(10) Plaintiff, Shanna Jakeman, by reason of the breaking into and entering of her premises by the defendants aforesaid, has suffered damages in the sum of Five Thousand ($5,000.00) Dollars; that by reason of her false imprisonment, this plaintiff has suffered damages [19] in the sum of Twenty Thousand ($20,000.00) Dollars; and by reason of the deprivation of her Constitutional rights, mental pain, anguish, suffering and injury to her reputation, plaintiff has suffered damages in the sum of Fifty Thousand ($50,000.00) Dollars; in all to her damage Seventy-five Thousand ($75,000.00) Dollars.

(11) Plaintiff, Pauline Kelso, by reason of the breaking into and entering of her premises by the defendants aforesaid, has suffered damages in the sum of Five Thousand ($5,000.00) Dollars; that by

reason of her false imprisonment, this plaintiff has suffered damages in the sum of Twenty Thousand ($20,000.00) Dollars; and by reason of the deprivation of her Constitutional rights, mental pain, anguish, suffering and injury to her reputation, plaintiff has suffered damages in the sum of Fifty Thousand ($50,000.00) Dollars; in all to her damage Seventy-five Thousand ($75,000.00) Dollars.

(12) Plaintiff, Max Theodore Miller, by reason of the breaking into and entering of his premises by the defendants aforesaid, has suffered damages in the sum of Five Thousand ($5,000.00) Dollars; that by reason of his false imprisonment, this plaintiff has suffered damages in the sum of Twenty Thousand ($20,000.00) Dollars; and by reason of the deprivation of his Constitutional rights, mental pain, anguish, suffering and injury to his reputation, plaintiff has suffered damages in the sum of Fifty Thousand ($50,000.00) Dollars; in all to his damage Seventy-five Thousand ($75,000.00) Dollars.

(13) Plaintiff, Homer G. Wilcox, by reason of the breaking into and entering of his premises by the defendants aforesaid, has suffered damages in the sum of Five Thousand ($5,000.00) Dollars; that by reason of his false imprisonment, this plaintiff has suffered damages in the sum of Twenty Thousand ($20,000.00) Dollars; and by reason of the deprivation of his Constitutional rights, mental pain, anguish, suffering and injury to his reputation, plaintiff has suffered damages in the sum of Fifty Thousand ($50,000.00) Dollars; in all to his damage Seventy-five Thousand ($75,000.00) Dollars.

Wherefore, plaintiffs pray for judgment against the defendants [20] and each of them as follows:

1. Arthur L. Bell, in behalf of "Mankind United": One Hundred Thousand ($100,000.00) Dollars;

2. Arthur L. Bell, individually: One Hundred Fifty-five Thousand ($155,000.00) Dollars;

3. Maude Askew: Seventy-five Thousand ($75,000.00) Dollars;

4. Eugene Wadsworth Brown: Seventy-five Thousand ($75,000.00) Dollars;

5. J. Fred Burkey: Seventy-five Thousand ($75,000.00) Dollars;

6. Lawrence Cook: Seventy-five Thousand ($75,000.00) Dollars;

7. A. Ray Elsea: Seventy-five Thousand ($75,000.00) Dollars;

8. Jacob Gloeckler: Seventy-five Thousand ($75,000.00) Dollars;

9. Bay Burns Sharp: Seventy-five Thousand ($75,000.00) Dollars;

10. Shanna Jakeman: Seventy-five Thousand ($75,000.00) Dollars;

11. Pauline Kelso: Seventy-five Thousand ($75,000.00) Dollars;

12. Max Theodore Miller: Seventy-five Thousand ($75,000.00) Dollars;

13. Homer G. Wilcox: Seventy-five Thousand ($75,000.00) Dollars;

Wherefore, plaintiffs further pray for such other and further relief as to the court may seem just and proper; and for their costs and disbursements.

LORRIN ANDREWS
A. L. WIRIN
By A. L. WIRIN
Attorneys for Plaintiffs [21]

State of California,
County of Los Angeles,—ss.

A. Ray Elsea, being by me first duly sworn, deposes and says: that he is one of the plaintiffs in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

A. RAY ELSEA

Subscribed and sworn to before me this 7th day of April, 1943.

[Seal] EDMUND L. SMITH,
Clerk U. S. District Court,
Southern District of California.
By JOHN A. CHILDRESS,
Deputy.

[Endorsed]: Filed April 7, 1943. [22]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To: The Plaintiffs Above Named, Arthur L. Bell, Maude Askew, Eugene Wadsworth Brown, J. Fred Burkey, Lawrence Cook, A. Ray Elsea, Jacob Gloeckler, *Ray* Burns Sharp, Shanna Jakeman, Pauline Kelso, Max Theodore Miller and Homer G. Wilcox: and

To: Their Attorneys, Lorrin Andrews, Esquire and A. L. Wirin, Esquire:

You, And Each of You, Are Hereby Notified that the defendant, Theodore Cruise, by the United States Attorney for the Southern District of California, Charles H. Carr, and Wm. W. Worthington and Mildred L. Kluckhohn, Assistant United States Attorneys for said District, will on the 19th day of July 1943, in the Courtroom of the Honorable Leon R. Yankwich, in the Federal Building, Los Angeles, California, at the hour of 10:00 A.M. thereof, or as soon thereafter as counsel can be heard, move this Honorable Court to dismiss the foregoing action and the complaint for damages for false imprisonment and unlawful search and seizure.

Said motion will be based upon this notice, upon

the records and files in the above entitled action, and the Points and Authorities hereto attached.

Dated June 8, 1943. [23]

CHARLES H. CARR,
United States Attorney
WM. W. WORTHINGTON,
Assistant U. S. Attorney,
MILDRED L. KLUCKHOHN,
Assistant U. S. Attorney,
Attorneys for Defendant,
Theodore Cruise.

[Endorsed]: Filed June 8, 1943. [24]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the defendant, Theodore Cruise, named a party defendant in the above entitled action by and through his attorney, Charles H. Carr, United States Attorney for the Southern District of California, and moves the Court to dismiss the above entitled action and Complaint For Damages For False Imprisonment and Unlawful Search and Seizure filed therein by reason of the fact that the Court lacks jurisdiction over the person of the defendant; the complaint fails to state a claim against the defendant upon which relief can be granted.

and for such other and further relief as the Court may deem just and proper.

Dated June 8, 1943.

CHARLES H. CARR,
United States Attorney
WM. W. WORTHINGTON
Assistant U. S. Attorney
MILDRED L. KLUCKHOHN,
Assistant U. S. Attorney
Attorneys for Defendant,
Theodore Cruise

[Endorsed]: Filed June 8, 1943. [25]

[Title of District Court and Cause.]

AMENDED MOTION TO DISMISS

Comes Now the defendant Theodore Cruise, named a party defendant in the above entitled action, by and through his attorney Charles H. Carr, United States Atorney for the Southern District of California, and moves the Court to dismiss the above entitled action and Complaint For Damages For False Imprisonment And Unlawful Search And Seizure, filed therein by reason of the fact that the complaint fails to state a claim against the defendant upon which relief can be granted, and for

such other and further relief as the Court mey deem just and proper.

Dated August 20, 1943.

CHARLES H. CARR
United States Attorney
MILDRED L. KLUCKHOHN
Asst. United States Attorney
Attorneys for Defendant,
Theodore Cruise. [26]

[Title of District Court and Cause.]

AFFIDAVIT OF R. B. HOOD

State of California
County of Los Angeles—ss.

R. B. Hood, being first duly sworn, deposes and says:

That he is the Special Agent in Charge, Federal Bureau of Investigation, United States Department of Justice, at Los Angeles, California;

That some months prior to December 17, 1942, an extensive investigation had been conducted throughout the State of California by Agents of the Federal Bureau of Investigation, into the activities of plaintiffs herein, in connection with the possible commission of seditious acts; that on December 17, 1942, a secret indictment, No. 15759, was returned by the Federal Grand Jury for the Southern District of California, before the Honorable Paul J. McCormick, Judge of the United States District Court, Los Angeles, California, charging plaintiffs herein with conspiracy to commit sedition, a felony under Section 34, Title 50, United States Code;

that at such time a motion was made [27] that warrants of arrest be directed to be executed either by the United States Marshal or Agents of the Federal Bureau of Investigation, and that pursuant thereto these warrants were ordered to be so executed; that said warrants of arrest were issued by the Clerk of the United States District Court, Southern District of California, on the afternoon of December 17, 1942, and a non est return was made by the United States Marshal at Los Angeles, California, as to all persons residing outside of the Southern Judicial District of California, except as to A. Ray Elsea;

That when the said secret indictment was returned and orders made, and at the same time of the issuance of the warrants of arrest for plaintiffs herein, Special Agents of the Federal Bureau of Investigation Patrick D. Horgan and Edward A. Furbush (the latter being a defendant herein), were present at all times and the warrants of arrest for those persons residing in the Southern Judicial District of California were handed to them for service after their issuance on the afternoon of December 17, 1942;

That affiant, on the afternoon of December 17, 1942, was advised by the United States Attorney of the return of the warrants of arrest for plaintiffs herein, and directed the apprehension thereof, particularly authorizing the arrest of those plaintiffs residing out of this Judicial District, as fugitives; that for these persons a warrant was then outstanding; that thereupon, affiant authorized the dispatch of information by teletype to the San

Francisco Office of the said Bureau, at 7:12 p.m., of the return of the secret indictment and issuance of the warrants and delivery thereof to the Special Agent at Los Angeles, and the execution of a bond as set by the Grand Jury, all on the said 17th day of December, 1942; that said teletype was sent on said date;

That the arrests, searches and seizures set forth in plaintiffs' complaint were not made until the 18th day of December, 1942.

R. B. HOOD [28]

Subscribed and Sworn to before me this 27 day of August, 1943.

[Seal] A. M. BECKER

Notary Public in and for the County of Los Angeles, State of California

My Commission Expires May 24, 1944.

[Endorsed]: Filed Aug. 28, 1943. [29]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To: The Plaintiffs Above Named, Arthur L. Bell, Maude Askew, Eugene Wadsworth Brown, J. Fred Burkey, Lawrence Cook, A. Ray Elsea, Jacob Gloeckler, *Ray* Burns Sharp, Shanna Jakeman, Pauline Kelso, Max Theodore Miller and Homer G. Wilcox; and

To: Their Attorneys, Lorrin Andrews, Esquire, and A. L. Wirin, Esquire:

You, and Each of You, Are Hereby Notified that the defendants R. B. Hood, John Roche, Robert T.

Pugh, Edward A. Furbush, Earl E. Staten, and Howard H. Davis, by the United States Attorney for the Southern District of California, Charles H. Carr, and Mildred L. Kluckhohn, Assistant United States Attorney for said District, will on the 14th day of September, 1943, in the Courtroom of the Honorable Ralph E. Jenney, in the Federal Building, Los Angeles, California, at the hour of 10:00 a.m. thereof, or as soon thereafter as counsel can be heard, move this Honorable Court to dismiss the foregoing action and the Complaint For Damages For False Imprisonment And Unlawful Search And Seizure. [30]

Said motion will be based upon this Notice, Affidavit of R. B. Hood, upon the records and files in the above entitled action, and the Points and Authorities hereto attached.

Dated August 20, 1943.

CHARLES H. CARR
United States Attorney
MILDRED L. KLUCKHOHN
Asst. United States Attorney
Attorneys for Defendants

[Endorsed]: Filed Aug. 28, 1943. [31]

[Title of District Court and Cause.]

AFFIDAVIT OF R. B. HOOD

State of California
County of Los Angeles—ss.

R. B. Hood, being first duly sworn, deposes and says:

That he is the Special Agent in Charge, Federal Bureau of Investigation, United States Department of Justice, at Los Angeles, California;

That some months prior to December 17, 1942, an extensive investigation had been conducted throughout the State of California by Agents of the Federal Bureau of Investigation, into the activities of plaintiffs herein, in connection with the possible commission of seditious acts; that on December 17, 1942, a secret indictment, No. 15759, was returned by the Federal Grand Jury for the Southern District of California, before the Honorable Paul J. McCormick, Judge of the United States District Court, Los Angeles, California, charging plaintiffs herein with conspiracy to commit sedition, a felony under Section 34, Title 50, United States Code; that at such time a motion [32] was made that warrants of arrest be directed to be executed either by the United States Marshal or Agents of the Federal Bureau of Investigation, and that pursuant thereto these warrants were ordered to be so executed; that said warrants of arrest were issued by the Clerk of the United Stats District Court, Southern District of California, on the afternoon of December 17, 1942, and a non est return was made by the United States Marshal at Los Angeles, California, as to all persons residing outside of the Southern Judicial District of California, except as to A. Ray Elsea;

That when the said secret indictment was returned and orders made, and at the time of the issuance of the warrants of arrest for plaintiffs

herein, Special Agents of the Federal Bureau of Investigation Patrick D. Horgan and Edward A. Furbush (the latter being a defendant herein), were present at all times and the warrants of arrest for those persons residing in the Southern Judicial District of California were handed to them for service after their issuance on the afternoon of December 17, 1942;

That affiant, on the afternoon of December 17, 1942, was advised by the United States Attorney of the return of the warrants of arrest for plaintiffs herein, and directed the apprehension thereof, particularly authorizing the arrest of those plaintiffs residing out of this Judicial District, as fugitives; that for these persons a warrant was then outstanding; that thereupon, affiant authorized the dispatch of information by teletype to the San Francisco Office of the said Bureau, at 7:12 p.m., of the return of the secret indictment and issuance of the warrants and delivery thereof to the Special Agent at Los Angeles, and the execution of a bond as set by the Grand Jury, all on the said 17th day of December, 1942; that said teletype was sent on said date;

That the arrests, searches and seizures set forth

in plaintiffs' complaint were not made until the 18th day of December, 1942

R. B. HOOD. [33]

Subscribed and sworn to before me this 27th day of August, 1943.

[Seal] A. M. BECKER

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 24, 1944.

[Endorsed]: Filed Aug. 28, 1943. [34]

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION TO DISMISS

To: The Plaintiffs Above Named, Arthur L. Bell, Maude Askew, Eugene Wadsworth Brown, J. Fred Burkey, Lawrence Cook, A. Ray Elsea, Jacob Gloeckler, *Ray* Burns Sharp, Shanna Jakeman, Pauline Kelso, Max Theodore Miller and Homer G. Wilcox; and

To: Their Attorneys, Lorrin Andrews, Esquire, and A. L. Wirin, Esquire:

Sirs:

Please Take Notice that the defendants Robert M. Montgomery, Carl B. Sherman, and Dennis G. Smith will move this Honorable Court before the Honorable Ralph E. Jenney, Judge of the United States District Court, U. S. Post Office and Court House, Los Angeles (12), California, on the 29th

day of November, 1943, at the hour of 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, to dismiss the above-entitled complaint filed herein by reason of the fact that said complaint fails to state a claim against the defendants upon which relief can be granted, and for such other and further relief as [35] the Court may deem just and proper.

That said Motion is based upon the affidavit of R. B. Hood heretofore filed herein in support of a Motion to Dismiss said complaint made by the defendants R. B. Hood, John Roche, Robert T. Pugh, Edward A. Fugbush, Earl P. Staten, and Howard H. Davis, and Points and Authorities likewise filed in support of last said Motion, which said Motion has been set for hearing on said 29th day of November, 1943. Said defendants beg leave to have said affidavit and said points and authorities considered as the affidavit and points and authorities in support of this said Motion.

Dated: November 16, 1943.

CHARLES H. CARR
United States Attorney
JAMES L. CRAWFORD
WM. W. WORTHINGTON
Assistant U. S. Attorneys
By WM. W. WORTHINGTON
Attorneys for Certain Defendants.

[Endorsed]: Filed Nov. 18, 1943. [36]

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

To: The Plaintiffs Above Named, Arthur L. Bell, Maude Askew, Eugene Wadsworth Brown, J. Fred Burkey, Lawrence Cook, A. Ray Elsea, Jacob Gloeckler, *Ray* Burns Sharp, Shanna Jakeman, Pauline Kelso, Max Theodore Miller and Homer G. Wilcox; and

To: Their Attorneys, Lorrin Andrews, Esquire, and A. L. Wirin, Esquire:

Sirs:

Please Take Notice that on the pleadings heretofore filed herein and the records in this case, a Motion will be made before the Honorable Ralph E. Jenney, Judge of the United States District Court, U. S. Post Office and Court House, Los Angeles (12), California, on the 29th day of November, 1943, at the hour of 10:00 o'clock in the forenoon thereof, or as soon thereafter as counsel can be heard [37] for a Summary Judgment in favor of the defendants R. B. Hood, John Roche, Robert T. Pugh, Edward A. Furbush, Earl P. Staten, Howard H. Davis, Robert M. Montgomery, Carl B. Sherman, and Dennis G. Smith, pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any matter of fact in the above-entitled complaint, and that said defendants are entitled to judgment against the plaintiffs as a matter of law, and for

such other, further and different relief as may be proper.

That said Motion is based upon the Affidavit of R. B. Hood heretofore filed herein in support of a Motion to Dismiss said complaint made by the Defendants R. B. Hood, John Roche, Robert T. Pubh, Edward A. Furbush, Earl P. Staten, and Howard H. Davis, and Points and Authorities likewise filed in support of last said Motion, which said Motion has been set for hearing on said 29th day of November, 1943. Said defendants beg leave to have said affidavit and said points and authorities considered as the affidavit and points and authorities in support of this said motion.

Dated November 16, 1943.

CHARLES H. CARR
United States Attorney
JAMES L. CRAWFORD
WM. W. WORTHINGTON
Assistant U. S. Attorneys
By WM. W. WORTHINGTON
Attorneys for Certain Defendants.

[Endorsed]: Filed Nov. 18, 1943. [38]

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE M. LANGDON

State of California,
City and County of San Francisco.—ss.

George M. Langdon being first duly sworn, deposes and says:

That he is one of the persons named as a defendant in the above-entitled action, and is, and was at all times hereinafter mentioned in this affidavit, a Special Agent of the Federal Bureau of Investigation of the United States Department of Justice assigned to the San Francisco office of the said Bureau;

That in the late afternoon of December 17, 1942, your affiant and other Special Agents of the Federal Bureau of Investigation were advised at San Francisco, California, by teletype received from the Los Angeles office of the Federal Bureau of Investigation that an indictment had been returned before the District Court of the United States for the Southern District of California, Central Division, in cause number 15759, charging Arthur L. Bell and other defendants with conspiracy to violate the Espionage Act of 1917, and that a warrant for the arrest of Arthur L. Bell had issued on said indictment and had [39] been returned non est by the United States Marshal for the Southern District of California;

That at 7:30 A. M. on December 18, 1942, your affiant, accompanied by the following Special Agents of the Federal Bureau of Investigation: Philip G. Bowser, Theodore S. Cruise, William F. Giesen and Eugene P. Greer, appeared at the Cathedral Apartments, 1201 California Street, San Francisco, California, for the purpose of apprehending Arthur L. Bell, one of the defendants named in the aforesaid indictment, who resided at apartment number 1502 of the said Cathedral

Apartments, and to effect a search of the said apartment incidental to the arrest;

That upon our arrival at the said Cathedral Apartments Special Agent William F. Giesen stationed himself at the offset on the 11th floor of the apartment building in order that he might observe any attempt by the defendant Bell to effect an escape on the fire-escape which came directly out of the defendant Bell's kitchen window to the 11th floor; that upon our arrival at the aforesaid apartments Special Agent Eugene P. Greer stationed himself in the lobby entrance of the said apartment building in order to pick up the said defendant Bell should he gain access to the elevator and gain exit from the apartment;

That at 7:40 A. M. your affiant and Special Agents Philip G. Bowser and Cruise appeared before the door of apartment number 1502 and knocked at the door loudly and rang the door-bell; that a lady, whom your affiant later ascertained to be Mrs. Bell, came to the door but did not open it and inquired as to the identity of the individuals knocking and was advised by Special Agent Theodore S. Cruise that they were Federal Officers, that a warrant for the arrest of Mr. Bell had been issued and was outstanding and requested that she advise Mr. Bell to admit the agents; that Mrs. Bell then made a general inquiry as to the grounds for the arrest and was advised by Special Agent Cruise that an indictment had been returned by the Federal Grand Jury at Los Angeles charging Mr. Bell with

conspiracy to violate the Espionage Act, after which Mrs. Bell said "Wait a minute"; that at all [40] times during this conversation the door to said apartment 1502 was locked; that your affiant and the agents with him waited for a period of six minutes during which time nothing happened and thereafter they knocked at the door and rang the bell loudly and no response from the occupants was received; that finally Mrs. Bell came to the door of the apartment again, and without opening the same, stated that she would see if Mr. Bell was in; that your affiant then told Mrs. Bell he knew full well that Bell was in and that if she did not open the door the agents would have the unpleasant duty of forcing an entrance; the door was not opened;

That Special Agent Bowser went down to the switch-board of the main lobby at 7:57 A. M. for the purpose of having the operator ring Bell's apartment several times; that your affiant could clearly hear the telephone bell ring in Mr. Bell's apartment but he heard no response thereto; that Special Agents Bowser and Greer returned to join your affiant and Agent Cruise before the doors entering the apartment at 1502 and once more Special Agent Cruise rang the bell and knocked but received no response; that Special Agent Cruise then in a very clear voice called out to Bell and to his wife and advised them they were given one more chance to open the door and admit the agents and that upon their failure to do so, the agents would assume Mr. Bell was resisting arrest by Federal officers and that pursuant to their duties as Special Agents and to

cause his arrest, it would be necessary for the agents to force an entrance; that neither Bell nor his wife answered said call, although your affiant and the agents with him could hear Mr. Bell and his wife conversing in the apartment; that following their refusal to open the door, and feeling that any further delay on the part of Bell and his wife to open the apartment door would enable them to destroy records which might be of value as evidence in the case of Arthur L. Bell and others, your affiant and the accompanying agents gained entrance to the apartment through the kitchen door by forcing a small service door in the lower panel of the kitchen door which opened into the hall several feet from the main [41] door entering the apartment; that Special Agents Cruise and Bowser admitted themselves through this opening and then opened the kitchen door and thereby admitted your affiant, while Special Agent Greer remained in the hall to watch the main entrance into the apartment; that your affiant and Agents Cruise and Bowser, upon entering the kitchen door, found that they had access to the dining-room and living-room but that the door leading into a hall was locked and that it was necessary to open this door before they could have access to the part of the house from which came the voices of Mr. Bell and his wife; that your affiant found it necessary to take the hinges off this door in order to admit them into the hall, which led to a bed-room and den from which the voices emanated; that immediately thereafter Agent Giesen

joined your affiant and the other agents in the apartment;

That your affiant and the other agents then knocked on the door of the bed-room and den which was the room from which the voices of Mr. Bell and his wife were emanating and advised them that they should open this door immediately otherwise your affiant and the agents would have the unpleasant task of having to force an entrance into the bed-room and den; that Mr. Bell then for the first time addressed your affiant and the other agents and advised them that he was dressing and that the agents would have to wait; that your affiant then stated to Mr. Bell that if he did not open the door in a period of exactly three minutes, it would be necessary to force an entrance through the door;

That at the end of exactly three minutes your affiant advised Bell that his time was up and that he should open the door; that the door was not opened, and after an interval of several minutes your affiant and the other agents exerted bodily force upon the door, whereupon Mr. Bell opened the door and immediately began a loud protest against the agents entering his apartment in the manner above-outlined; that Mr. Bell quoted the Constitution and Bill of Rights and demanded that he be shown a search warrant and a warrant for his arrest; that he was then advised by your affiant that a warrant for [42] his arrest had issued in Los Angeles for conspiracy to violate the Espionage Act of 1917 and that a search warrant was not necessary

since the agents were there for the purpose of arresting Mr. Bell and making such search as was necessary and incidental to his arrest;

That immediately thereafter your affiant and the other Special Agents of the Federal Bureau of Investigation presented their credentials and badges to Mr. Bell and again advised him that they were Federal officers and Special Agents of the Federal Bureau of Investigation and that he, Bell, was under arrest; that the time at which the defendant Bell was advised that he was under arrest was 8:10 A.M. of said day; that immediately following the arrest of Bell he was requested, together with his wife, to come into the living-room, at which time Mr. Bell was thoroughly searched by your affiant and Special Agent Bowser; that at that time Mr. Bell was fully clothed even to the extent of a necktie; that no effort was made at this time or at any other time to search the person of Mrs. Bell and she was asked to seat herself on the divan in the living-room and to make herself as comfortable as possible;

That your affiant and the accompanying agents observed that the door to a small den leading from the bed-room was locked and it was apparent to them that the search would consume a considerable period of time; that thereafter your affiant asked Mr. Bell and Mrs. Bell whether they desired to have their breakfast brought up to them or whether they desired coffee, orange juice, or any other item; that both Mr. and Mrs. Bell at this time declined to have food or refreshments of any kind; that follow-

ing the search of the person of Mr. Bell, Special Agents Giesen and Bowser remained in the living-room with Mr. and Mrs. Bell and your affiant and Special Agents Cruise and Greer then commenced a search of the apartment; that with the commencement of the search it was ascertained that the closet located in the hall near the main entrance to the apartment, and the closet opposite the door of the den, and the door of the den, were locked; that affiant asked Mr. Bell to furnish the keys for these [43] doors and advised him it would be necessary for the agents to force an entrance through the doors if he refused to open them voluntarily; that Mr. Bell refused to furnish any keys, stating that affiant and the agents were operating outside the law and used illegal methods and that they had no right to search anything without a search warrant that specifically designated the articles desired;

That following Mr. Bell's refusal to open the doors or advise where the keys were, your affiant and the other Special Agents located many keys which were tried upon the locked doors; that one of the keys did open the door to the den but no key was found which would open the two closet doors, making it necessary for your affiant and the agents to remove the two closet doors from their hinges and place the same in an orderly manner across the wall; that during this time Mr. Bell went over and sat on the divan near his wife, held her hand and stated to her in the presence of your affiant and the other agents that the agents were very nice and very gentlemanly in their conduct, to which Mrs.

Bell replied that "indeed they were" and that she and her husband had certainly been accorded very courteous treatment by all the agents and that she surely appreciated their thoughtfulness and understanding;

That your affiant and the agents in opening the door to the den found it in wild disorder and contained several locked cabinets in addition to numerous bundles, bags and boxes strewn around the floor, on the chairs and in cabinets; that before your affiant and the agents started the examination and search of this room and the inspection of the papers therein contained, Special Agent Cruise took five pictures of the said den and its then contents; that after your affiant and the other agents began an examination of the papers and objects contained in the said den, Mr. Bell began to assist the agents in opening various lockers and cabinet drawers and that while he would not tell them which keys would fit, he did "fool around with the keys" and gave them a *clew* as to which ones would open the respective lock; that he did not open them himself;

[44]

That Mr. Bell, after the agents had been looking over the cartons in which many of the papers and documents were contained and which your affiant observed were papers of the Mankind United, asked the agents if he could not assist them in order to expedite the handling of the voluminous material in the apartment and asked them whether or not such assistance on his part would constitute a consent to the action of the agents; that affiant advised

Mr. Bell that his assistance in that regard would not alter his legal status in any way;

That while the search was going on Mrs. Bell prepared a breakfast for Mr. Bell and herself, which was consumed by them; that Mr. Bell during the search took his coat off, rolled up his sleeves and aided in the packing of the Mankind literature, papers, records and documents in cartons, which he produced; that while the papers and documents and other articles were being packed, Mr. Bell took an inventory of the same, as did also Agents Greer and Giesen; that while the search was being conducted and the documents of Mankind United were being packed, Mr. Bell engaged the agents in conversation in which he expressed the hope that his ideas on sedition and those of the agents were the same and that there would not be too much publicity in connection with his arrest, indicating to the agents that more than a million of his followers throughout the state would, through their blind loyalty and fidelity to the cause, take misguided action;

That once access had been gained to all the doors, closets and drawers of the apartment, it was evident to the affiant and to the other agents that it would be impossible to go through the voluminous records and literature of Mankind United contained in the said apartment, and properly identify, mark and pack the same, and Special Agent Cruise thereupon telephoned the office of the Federal Bureau of Investigation and requested that other agents be sent to assist in the marking and packing of the material seized in the search; that upon completion

of the search of the premises the doors which had been removed were rehung and the apartment placed in *an* orderly a condition [45] as possible; that while the search was being conducted and at 12:10 P. M. Special Agent Cruise left the apartment for the purpose of proceeding to the office of the United States Commissioner in the Post Office Building at San Francisco, California, to there file a complaint for the removal of the defendant Bell to Los Angeles; that at approximately 1:30 P. M. your affiant and the other Special Agents who accompanied him to the apartment, with the exception of Special Agent Cruise, left the apartment of Mr. Bell for the purpose of booking him at the City Prison of the Police Department of the City and County of San Francisco en route to the United States Marshal; that while leaving the apartment of the defendant Bell and in the corridor, your affiant and the other Special Agents encountered one Charles R. Garry, who stated that he was the attorney for Mr. Bell, and affiant advised Mr. Garry, upon inquiry from him, that he would be able to locate Mr. Bell at the City Prison;

That thereafter your affiant and the agents accompanying him took Mr. Bell to the garage of the apartment house where he was placed in a car of the Federal Bureau of Investigation and taken from the said apartment to the City Jail of the City and County of San Francisco, where at 1:50 P. M. he was booked by Officer Albert Lundy, Star No. 858, en route to the United States Marshal; that prior to the departure of the affiant and Spe-

cial Agents Bowser and Giesen from the City Jail, where they had booked Mr. Bell, Mr. Bell extended his hand and advised them that he wanted to shake hands with the agents and thank them for the courteous treatment that they had accorded him and Mrs. Bell and he stated to them that he hoped when this was all over he could know the agents under more pleasant circumstances; that at no time did your affiant or any other agents of the Federal Bureau of Investigation use any threatening or abusive language of any kind or character toward Mr. Bell or Mrs. Bell;

That at no time did Mr. Bell while in the presence of the agents or in their custody or while being booked at the City Prison request that he be brought before a United States Commissioner or any [46] other magistrate or judge whatsoever;

That during all of the time from 8:10 A. M., when your affiant and the agents placed Mr. Bell under arrest, until they left the apartment of Mr. Bell at approximately 1:30 P. M., your affiant and the Special Agents were engaged in the search of the premises and the marking, listing and packing of the documents, papers and circulars and other articles of Mankind United; that throughout all this time Mr. Bell, at his request, was permitted to assist in the packing of the above-mentioned articles and he took and kept a personal inventory of the same;

That your affiant, and Special Agent Cruise in particular, were familiar with the literature of

Mankind United and the seditious character of the same, and that Special Agent Cruise was one of the witnesses who appeared before the Grand Jury which returned the indictment; that the following day when your affiant and other agents of the Federal Bureau of Investigation were rechecking the documents, papers and literature seized as aforesaid, they found in certain envelopes packed with the records of Mankind United, the sum of $8190.25 in currency of the United States; That at no time did Mr. Bell state or indicate in any manner to your affiant or the agents, that said money or any moneys were contained in or with the documents and envelopes seized by your affiant and the other agents aforesaid.

GEORGE M. LANGDON.

Subscribed and sworn to before me this 29th day of November, 1943.

[Seal] FRANCIS ST. J. FOX,
U. S. Commissioner Northern District of California at S. F.

[Endorsed]: Filed Dec. 4, 1943. [47]

[Title of District Court and Cause.]

AFFIDAVIT OF
AUGUSTUS F. SCHERMERHORN

State of California,
City and County of San Francisco—ss.

Augustus F. Schermerhorn, being first duly sworn, deposes and says:

That he is one of the persons named as a defendant in the above entitled action, and is, and was at all times hereinafter mentioned in this affidavit, a Special Agent of the Federal Bureau of Investigation of the United States Department of Justice assigned to the San Francisco office of the said Bureau.

That in the late afternoon of December 17, 1942, your affiant, together with other Special Agents of the Federal Bureau of Investigation, was advised by a teletype received from the Los Angeles office of the Federal Bureau of Investigation that an indictment had been returned before the District Court of the United States for the Southern District of California, Central Division, charging Arthur L. Bell and J. Fred Burkey and others with conspiracy to violate the Espionage Act of 1917, that a warrant for the arrest of J. Fred Burkey had issued on said indictment, and the same had been returned non est by the United [48] States Marshal for the Southern District of California.

That on the morning of December 18, 1942, at approximately 7:40 o'clock A.M., your affiant and Special Agents William A. Branigan, Cecil C. Humphreys, and Arthur F. Baier were admitted to the premises and residence of J. Fred Burkey, 5523 Laverne Street, Oakland, California; where your affiant and the aforesaid Agents had gone for the purpose of apprehending Mr. Burkey and making such search as was necessary incidental to said arrest; that Mrs. Burkey, the wife of the aforesaid J. Fred Burkey, was present at said time, and although

each Agent produced his credentials, she asked to examine them, and at the time copied the name of each of the Special Agents present; that Mr. Burkey asked to see the warrant of arrest, but was advised by your affiant and the Special Agents that they were acting under emergency powers, that they had no warrant of arrest with them, but that an indictment had been returned in Los Angeles by the Federal Grand Jury, charging him with conspiracy to violate the Sedition Statute, and that a warrant had been issued for Mr. Burkey; that Mr. Burkey did not question the right of the agents to arrest him under the circumstances.

That at approximately 8:00 o'clock A.M., your affiant telephonically notified the San Francisco office of the Federal Bureau of Investigation of the subject's apprehension. That after placing Mr. Burkey under arrest he was advised that a search of his premises would be conducted, to which he protested, saying that your affiant and the Agents did not have the right to do so under the Constitution of the United States; that your affiant and the Special Agents advised Mr. Burkey that the search was being made on the premises immediately under Mr. Burkey's control as an incident to his arrest; that Mr. Burkey then stated to your affiant and the Agents that the search would be conducted over his protest, that they had no right to do so, and that it was necessary for the Agents to have a search warrant issued by a Federal Judge setting forth exactly what was to be found upon the premises; that Mr. Burkey was again told that under the

circumstances of his arrest it was not necessary to have a search warrant. That dur- [49] ing the search, and at the time of the apprehension of Mr. Burkey, your affiant produced a search warrant covering the premises at 5538 Foothill Boulevard, Oakland, California, which is the business establishment of the J. Fred Burkey Ambulance Company, and copies of this search warrant were given to both Mr. and Mrs. Burkey. Mr. Burkey then remarked that this search warrant did not cover his residence, and again stated that the search of his residence would be conducted over his protest.

Mr. and Mrs. Burkey were afforded every courtesy by your affiant and the Agents, and he was told that he would be allowed to get dressed and have breakfast if he wished; that Mr. Burkey declined to dress, but did put on his shoes, socks, and trousers, and he also declined to eat. No restrictions whatever were placed on Mrs. Burkey, and she was permitted the full run of the house and the privilege of answering incoming telephone calls and the doorbell, and doing any other acts she desired. Thereafter the premises were searched, and in the search of the dining room, locked buffet cabinets were willingly opened by Mrs. Burkey. That during the course of the search your affiant located an envelope containing financial statements in connection with the operation of Mankind United, and moneys were attached thereto; that this money was then counted in the presence of Mr. Burkey, and returned to him, together with a copy of each statement to which the money was attached: Mr. Burkey then gave a

signed receipt therefor; that these receipts were then attached to the original Mankind United statements which were seized and removed as evidence.

That Mrs. Burkey was asked if she would execute a questionnaire concerning ankind United; that she declined to do so, but did make certain oral statements to Special Agent Humphreys in answer to a prepared questionnaire form from which the questions were asked; that Mrs. Burkey stated she did not wish to answer all the questions contained in the questionnaire, nor make any statements, without consulting an attorney. That Mr. Burkey was also asked to execute a questionnaire, but he stated that he would not answer the questions contained in the [50] prepared questionnaire until he had discussed the matter with an attorney. That the search of the aforesaid premises was concluded at approximately 12:30 o'clock P.M., at which time Mr. and Mrs. Burkey, at the suggestion of the Agents, had lunch in the kitchen. That after this, Mr. Burkey changed his clothes, and at approximately 1:15 o'clock P.M., the evidence collected at the aforesaid residence was placed in a car of the Federal Bureau of Investigation, and a receipt for the said evidence was signed by Mrs. Burkey, and a copy thereof given to her.

That Mr. Burkey then accompanied the Agents to his place of business at 5538 Foothill Boulevard, Oakland, California, for which a search warrant had previously issued; that Mr. Burkey willingly unlocked the door and permitted the Agents to enter the said premises without protest. A search was

then conducted by Special Agents Baier, Humphreys and Branigan while your affiant took twelve photographs of the inside of the garage, showing two mimeograph machines, folding chairs, wall signs, and volumes of literature.

That at approximately 2:30 P.M., Mr. Burkey was advised by the Agents that he would have to accompany two of them to the Eastern Division of the Oakland Police Department; that he was told by Agent Baier that his wife would be permitted to come over to the Ambulance Company premises and to remain with the Agents until the conclusion of the search; that Mr. Burkey agreed to this, and stated that he would telephone his wife from his place of business; that Mr. Burkey then telephoned his wife and told her to come over and be with the agents while they were conducting the search. That after this telephone call, Mr. Burkey was permitted to shave and wash, and then willingly accompanied your affiant and Special Agent Baier to the Eastern Division Police Station, where he was booked en route to the United States Marshal.

That thereafter your affiant and Special Agent Baier returned to the said business premises of Mr. Burkey, at 5538 Foothill Boulevard, Oakland, California, and continued the search of the premises with [51] Agents Humphreys and Branigan in the presence of Mrs. Burkey.

That at no time did Mr. Burkey request that he be brought before a United States Commissioner, or any other magistrate or judge. That your affiant participated in the investigation of the activities of

Mankind United and is familiar with the literature of said Mankind United, and the seditious character of the same, and that the literature seized in the aforesaid premises was literature of Mankind United and believed by your affiant to be seditious and of evidentiary value in the trial of the indictment returned and pending at Los Angeles, California.

AUGUSTUS F. SCHERMERHORN

Subscribed and sworn to before me this 29th day of November, 1943.

[Seal] FRANCIS ST. J FOX

U. S. Commissioner Northern District of California at San Francisco.

[Endorsed]: Filed Dec. 4, 1943. [52]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN C. NORRIS

State of California,
City and County of San Francisco—ss.

John C. Norris, being first duly sworn, deposes and says:

That he is one of the persons named as a defendant in the above-entitled action, and is, and was at all times hereinafter mentioned in this affidavit, a Special Agent of the Federal Bureau of Investigation of the United States Department of Justice assigned to the San Francisco office of the said Bureau.

That in the late afternoon of December 17, 1942,

your affiant, together with other Special Agents of the Federal Bureau of Investigation was advised by a teletype received from the Los Angeles office of the Federal Bureau of Investigation that an indictment had been returned before the District Court of the United States for the Southern District of California, Central Division, charging Arthur L. Bell and [53] Jacob G. Gloeckler and others with conspiracy to violate the Espionage Act of 1917, that a warrant for the arrest of Jacob G. Gloeckler had issued on said indictment, and the same had been returned non est by the United States Marshal for the Southern District of California.

That on December 18, 1942, your affiant, together with Special Agents Edward W. Butler, Jr., Paul J. O'Farrell and Michael J. Cassidy of the Federal Bureau of Investigation, proceeded to the home of Jacob G. Gloeckler at Denair, California, for the purpose of apprehending said Jacob G. Gloeckler and making such search of his premises at the time of the arrest as was necessary and incidental to the arrest; that your affiant and the aforesaid Special Agents of the Federal Bureau of Investigation arrived at the premises of said Jacob G. Gloeckler at 8:05 A.M. o'clock, and there knocked upon the door of his home; that in response to the knocking of your affiant and the aforesaid Agents, Jacob G. Gloeckler appeared at the door in his night clothing and a bathrobe; that your affiant and the aforesaid Special Agents then explained to Mr. Gloeckler that it was necessary for them to take him into custody since an indictment had been returned against him

and others by the Federal Grand Jury at Los Angeles, charging a conspiracy to violate the Espionage Act of 1917; that your affiant and Special Agent Michael J. Cassidy entered the home of Mr. Gloeckler and at the time advised him that he should get dressed into warm clothing before being taken from his home. Your affiant and Special Agent Cassidy remained in the front room while Mr. Gloeckler went to an upstairs bedroom, where he said his wife was. That shortly thereafter, Special Agent O'Farrell entered the home of Mr. Gloeckler and was present when Mr. Gloeckler came back into the front room accompanied by his wife, who was wearing a housedress; that Mr. Gloeckler had on his shirt, trousers, and shoes. That thereafter, a brief statement of the background information of Mr. Gloeckler was secured from him while Mr. Gloeckler, at the suggestion of your affiant and the Special Agents accompanying him, was fixing a breakfast; that at approximately 8:15 A.M., Special Agent Edward W. Butler, Jr. entered the front door and [54] Special Agent Michael J. Cassidy left the house for the purpose of telephoning his office and advising of the apprehension of Mr. Gloeckler. At the conclusion of the breakfast, Special Agent Michael Cassidy returned to the aforesaid premises, and thereafter Special Agents Butler and O'Farrell had Mr. and Mrs. Gloeckler execute a questionnaire relative to Mankind United and its activities; that the execution of the questionnaires commenced at approximately 8:50 A.M., and terminated at approximately 10:30 A.M.; that while the agents were at the afore-

said premises and the said questionnaires were being executed, certain persons visited the aforesaid premises and there engaged in conversation with Mr. and Mrs. Gloeckler. That upon the completion of the aforesaid questionnaires at 10:30 A.M., Mr. and Mrs. Gloeckler reread the same, made corrections, and signed the same at approximately 10:40 A.M. That during the execution of the aforesaid questionnaires your affiant and the other Special Agents made a search of the aforesaid premises, and completed the same at approximately 11:35 A.M. That during all this time certain telephone calls came into the home of Mr. Gloeckler and were answered by either Mr. Gloeckler or his wife, and one of the calls, Mr. Gloeckler stated, was from a newspaper reporter who wanted to talk to him and was coming out to the house.

That thereafter, and at approximately 11:45 A.M., your affiant and the other Special Agents left the home of Mr. Gloeckler with Mr. Gloeckler in their custody. Special Agents Michael J. Cassidy and Edward W. Butler, Jr. took Mr. Gloeckler to the Stanislaus County Jail, where he was booked en route to the United States Marshal for the Northern District of California. Your affiant and Special Agent Paul J. O'Farrell did not accompany Mr. Gloeckler and Special Agents Cassidy and Butler on their trip to the jail.

That at no time during the course of the interview and the search of the premises of Mr. Gloeckler, or after his apprehension, did he ask or request that he be brought before a United States Commissioner,

or any other magistrate or judge; that Mr. Gloeckler made no request for counsel, and all requests made by him were granted by [55] your affiant and the aforesaid agents. That your affiant participated in the investigation of the activities of Mankind United and is familiar with the literature of said Mankind United, and the seditious character of the same, and that the literature seized in the aforesaid premises was literature of Mankind United, and believed by your affiant to be seditious and of evidentiary value in the trial of the indictment returned and pending at Los Angeles.

JOHN C. NORRIS

Subscribed and sworn to before me this 29th day of November, 1943.

[Seal] FRANCIS ST. J. FOX

U. S. Commissioner Northern District of California at San Francisco.

[Endorsed]: Filed Dec. 4, 1943. [56]

[Title of District Court and Cause.]

AFFIDAVIT OF LOUIS D. WINE

State of California,

City and County of San Francisco—ss.

Louis D. Wine, being first duly sworn, deposes and says:

That he is one of the persons named as a defendant in the above entitled action, and is, and was at all times hereinafter mentioned in this affidavit,

a Special Agent of the Federal Bureau of Investigation of the United States Department of Justice assigned to the San Francisco office of the said Bureau.

That in the late afternoon of December 17, 1942, your affiant, together with other Special Agents of the Federal Bureau of Investigation was advised by a teletype received from the Los Angeles office of the Federal Bureau of Investigation that an indictment had been returned before the District Court of the United States for the Southern District of California, Central Division, charging Arthur L. Bell and Max Theodore Miller and others with conspiracy to violate the Espionage Act of 1917, that a warrant for the arrest of Max Theodore Miller had issued on said indictment, and the same had been returned non est by [57] the United States Marshal for the Southern District of California.

That on the morning of December 18, 1942, at approximately 7:40 o'clock A.M. thereof, your affiant, accompanied by Special Agents John William Schaller, Frank Good, and John P. Manton, of the Federal Bureau of Investigation, arrived at the home of Max Theodore Miller, at 1264 Latham Street, Mountain View, California, where your affiant and Special Agent Schaller rang the doorbell; that Mrs. Max Theodore Miller came to the door, and your affiant and Special Agent Schaller introduced themselves by displaying their badges and commission cards; that Mrs. Miller called her husband to the door, but your affiant and the Special

Agents accompanying him were refused admission after announcing that they were there for the purpose of apprehending Mr. Miller on a felony indictment returned at Los Angeles charging conspiracy to violate the Espionage Act of 1917; that subject was arrogant and belligerent in his attitude and demeanor toward your affiant and the Special Agents, and your affiant, after advising Special Agent Schaller to watch the front entrance and Special Agents Good and Manton to watch the rear and to keep out of range of the windows because of the possibility that Max Theodore Miller might use force, went to the nearest telephone and telephoned the San Francisco office of the Federal Bureau of Investigation for further instructions; that your affiant was advised that he and the Special Agents accompanying him should again seek entrance to the home, and if necessary, to break the door. That your affiant returned to the home of Mr. Miller, who again came to the door and stated that he would not let affiant and the Agents in; that Mr. Miller refused to open the door, but talked to your affiant and the Special Agents through a bolted screen door; that Mr. Miller was told that if he did not submit to arrest peacefully it would be necessary to break down the door; that Mr. Miller still refused, and your affiant then produced his sidearm and told him that he was under arrest, to put up his hands, and to open the screen door, which Mr. Miller then did; that Mr. Miller was then handcuffed, and one of the aforesaid Agents was then assigned to guard Mr. Miller. [58]

Thereafter, your affiant and the other Special Agents searched the aforesaid premises, and Special Agent Manton took pictures thereof. That following said search, your affiant and the Special Agents of the Federal Bureau of Investigation took and seized certain books, documents, pamphlets, and literature of Mankind United, and $1201.85, money found in a strong box, and constituting funds of "the Organization". The evidence thus obtained was marked for identification, carefully packed, and a receipt was given to Mr. Miller for the $1201.85 after it was counted by your affiant and Special Agent Good in the presence of Mr. Miller. Immediately thereafter, Mr. Miller was taken directly to San Jose, California, and booked at the County Jail en route to the United States Marshal at 12:30 P.M. of said day.

That at no time did Mr. Miller request that he be brought before a United States Commissioner, or other magistrate, or judge. That your affiant participated in the investigation of the activities of Mankind United and is familiar with the literature of said Mankind United, and the seditious character of the same, and that the literature seized in the aforesaid premises was literature of Mankind United, and believed by your affiant to be seditious and of evidentiary value in the trial of

the indictment returned and pending at Los Angeles, California.

LOUIS D. WINE

Subscribed and sworn to before me this 29th day of November, 1943.

[Seal] FRANCIS ST. J. FOX,
U.S. Commissioner Northern District of California at S. F.

[Endorsed]: Filed Dec. 4, 1943. [59]

[Title of District Court and Cause.]

AFFIDAVIT OF CARL B. SHERMAN

United States of America,
Southern District of California—ss.

I, Carl B. Sherman, a Special Agent, Federal Bureau of Investigation, being duly sworn, on oath, hereby depose and say:

On December 18, 1942, at 7:30 a.m., accompanied by Special Agent Earl K. Adams and Peggy Davis, a Matron, I presented myself at 3636 Georgia Street, San Diego, California. I knocked at the door and in answer to the knock a young boy came to the door. I asked him if his mother Mrs. Maude Askew, was at home. He said that she was, and in a moment Mrs. Askew came to the door. At that time I exhibited my credentials, introduced Agent Adams, who exhibited his credentials, and introduced Peggy Davis, the Matron.

I stated to Mrs. Askew that I had a warrant for her arrest. She asked us to come into the living room, which we did, standing just inside the front door. Mrs. Askew asked to see the warrant, took it and read it, taking approximately five minutes to do so. She then said she had done nothing that she was afraid of and that she was ready to go. I told her that I desired to search the premises, and she said I had no right to do so unless I had a search warrant. I explained to [60] her that I had a right to search the premises where she was arrested incident to the warrant of arrest and that no separate warrant of search and seizure was necessary. She then stated that if that were the case I had her permission to search the premises. I told her that I particularly wanted all documents relative to the organization "Mankind United." She took me into the next room, stating that nearly all her papers concerning "Mankind United" were kept therein. I had a list of particular papers which had been handed me by Special Agent Earl Staten, and I asked Mrs. Askew particularly for those papers. She took the various papers that I asked for originally from various notebooks that she removed from a drawer in a cabinet and from a table in the room. Noting numerous other documents all relative to "Mankind United", I told her that I desired to take them all so that they might be examined by the United States Attorney. She agreed to our taking the documents and handed them to me. I gave her a receipt for the documents, although she stated it was not necessary.

During the course of securing the documents from her, Mr. Askew, her husband, voluntarily went into a room and brought forth a document which I recall to be Bulletin No. 1, containing the poem "The Call of War."

After the various documents had been gathered together, Special Agent Adams asked if he might look around the yard, as we had been advised that they had gasoline stored about the premises. Mr. Askew voluntarily showed Agent Adams around and over the yard.

At the time the agents presented themselves at the front door, Mrs. Askew was fully dressed and apparently was just sitting down to breakfast. Following the securing of the various documents, which took approximately 30 minutes, Mrs. Askew sat down with her family and ate breakfast. This took approximately ten minutes. She then asked whether or not she could change her clothes before accompanying the agents to the county jail. She was advised that she could do so. I then went into the living room with Agent Adams and she went into her bedroom, where she dressed in the presence of the Matron, Peggy Davis, and her [61] daughter. She then went into the bathroom alone and Mrs. Davis waited just outside the bathroom door. She took approximately 25 minutes to dress, following which time she was taken to the county jail in San Diego and was booked at 8:55 a.m. on December 18, 1942. The charge was given as violation of Sec. 33, Title 50, U.S.C.—hold for United States Marshal.

During the course of the search her daughter stated to her mother that she hoped I would be able to talk some sense into her mother's head.

On the way from her home to the county jail Mrs. Askew advised that I, Mr. Adams and Peggy Davis had conducted her arrest in a gentlemanly manner and that she had no complaint to make with reference to the way she had been treated. She at no time made any request to be taken before a committing magistrate, and I did not take her before a committing magistrate because she was arrested under a warrant following indictment by the Grand Jury. Immediately upon placing Mrs. Askew in jail, I notified the United States Marshal of her arrest.

CARL B. SHERMAN

Subscribed and sworn to before me this 29th day of November, 1943.

[Seal] EDMUND L. SMITH,
Clerk of the United States District Court for the Southern District of California.
By P. D. HOOSER,
Deputy.

[Endorsed]: Filed Dec. 4, 1943. [62]

[Title of District Court and Cause.]

AFFIDAVIT OF DENNIE G. SMITH (FBI AGENT) IN REPLY TO PETITION OF LAWRENCE H. COOK

United States of America,
Southern District of California—ss.

Dennie G. Smith, being first duly sworn, deposes and says:

That he was at all times herein mentioned a Special Agent of the Federal Bureau of Investigation and during the month of December, 1942, he was then assigned to the San Diego office of the Federal Bureau of Investigation.

That prior to making the arrest of Mr. Cook, he and two other agents of the Federal Bureau of Investigation called at his premises; they knocked upon the door of his premises at about the hour of 7:30 o'clock a.m., December 18, 1942, and first Mrs. Cook came to the door; whereupon, affiant states, we inquired of Mrs. Cook if her husband, Mr. Cook, were home, and she replied that he was there; whereupon I asked Mrs. Cook that she call Mr. Cook to the door. Shortly thereafter, the defendant Cook appeared at the door; whereupon I told him that I had a warrant for his arrest and the warrant was displayed; this warrant is the original warrant now filed in the herein case, and I have inspected said warrant since it has been so filed. This [63] warrant was directed not only to the Marshal, but likewise to the agents of the Federal Bureau of Investigation.

When Mr. Cook appeared at the door, he was

advised that we were Federal Agents, and had come to make his arrest in connection with this case. Whereupon, Mr. Cook opened the screen door, and told us to come in.

We then entered the premises, and Mr. Cook stated that he would go to his room and dress, which he did, and at all times one or the other of us agents stayed in his immediate presence.

After Mr. Cook had dressed, we advised him that as an incident to his arrest, it was our duty to make a search of his premises to see if he had any papers, material, books, or pamphlets, of the nature which I had been advised was referred to in the indictment, and which pertained to seditious activities or to the movement known as Mankind United, and we then proceeded to conduct a search of his premises.

In the living room, the room which we had entered immediately from the street, after going through a small hall, we found certain material, all of which pertained to Mankind United.

According to my best recollection, Mr. Cook was booked at the County Jail at San Diego, California, by myself and other agents, as a prisoner for the United States Marshal, at about the hour of 3 o'clock p.m. on December 18, 1942.

There was some delay in booking Mr. Cook, the reason being as follows, to wit:

In the conferences that we had at the Federal Bureau of Investigation, preceding the arrest of Mr. Cook, we were advised that many of the defendants, or persons operating or affiliated with

the movement known as Mankind United, were storing large quantities of gasoline to further their efforts in carrying out the program of their conspiracy in connection with the principles they were advocating under the movement known as Mankind United.

In searching the premises which Mr. Cook was occupying and those immediately adjacent thereto, which he stated belonged to him, [64] after making a rather thorough search, we uncovered numerous five-gallon cans, containing gasoline. This required considerable digging about the yard of said premises, and in all there were uncovered 244 gallons of gasoline.

That a search of the premises took approximately 4½ hours, during all of which time said Cook was arguing and discussing with the agents concerning their search and method of searching; that at no time from the arrest of said Cook did said Cook suggest, request or demand of affiant or any agent of the Federal Bureau of Investigation that he be immediately or otherwise booked by said affiant or anyone else.

DENNIE G. SMITH,
Affiant.

Subscribed and sworn to before me, this 30 day of November, 1943.

[Seal] HELEN C. POLK,
Notary Public in and for the County of San Diego, State of California.

My Commission Expires Jan. 28, 1945.

[Endorsed]: Filed Dec. 4, 1943. [65]

[Title of District Court and Cause.]

AFFIDAVIT OF H. FRANK ANGELL

United States of America,
Southern District of California—ss.

H. Frank Angell being duly sworn deposes and says that he was at all times hereinafter mentioned, a Special Agent of the Federal Bureau of Investigation, and on the 18th day of December, 1942, was assigned to the Los Angeles Office of the Federal Bureau of Investigation of the U. S. Department of Justice; that at 7:30 A.M. on the 18th day of December, 1942, deponent, together with Special Agents John Roche, Jarrard Secrist and Malcolm G. Powrie, arrived at the premises of A. Ray Elsea located at 1405 Laveta Terrace in the City of Los Angeles, and rang the doorbell of the residence of said Elsea, and in a few moments thereafter said Elsea came to the door dressed in a bathrobe; that deponent's identity and those of the above named Special Agents were immediately made known to the said Elsea and he was advised by said Agents that they possessed a warrant for his arrest.

Your deponent and the Agents thereupon entered the house and showed the warrant to Elsea and advised him that it would be necessary to search his premises, to which he at first objected. It was then pointed out to Elsea that the warrant for his arrest covered such a search and that same would be made. He continued for several minutes [66] thereafter to object to such search and then abandoned his objections. Elsea's residence is made up

of four small rooms, one of which is a bedroom and kitchenette, one room having been made over into what looked like an office containing a steel desk, upon which was a typewriter and miscellaneous books and pamphlets at the time deponent and said agents entered the premises. There was at such time a mimeograph machine in this room. In the cupboard in said room were various items of writing material and mimeographed sheets. In the kitchenette was an electric typewriter and cupboard stacked full of mimeograph sheets and material dealing with Mankind United and books and pamphlets of the same. Your deponent, and the above stated agents, in his presence, examined the contents of the rooms, desk and other furniture in the premises. Among other matters found upon the premises were 24 notebooks containing pencil notes of Elsea concerning matters relative to Mankind United.

Your deponent and the said agents were at no time during the search of said Elsea's residence and/or from the time of their arrival there, as above stated, dilatory in their search of said premises, and did at all such times use the utmost expedition that could be used with a proper search

under such circumstances; that such search was completed at 1:15 P.M. o'clock on the same day.

H. FRANK ANGELL

Subscribed and sworn to before me this 1st day of December, 1943.

[Seal]: EDMUND L. SMITH,
Clerk, U. S. District Court,
Southern District of California.

By JOHN A. CHILDRESS,
Deputy.

[Endorsed]: Filed Dec. 4, 1943. [67]

[Title of District Court and Cause.]

AFFIDAVIT OF RICHARD C. THOMPSON (FBI AGENT) IN REPLY TO PETITION OF EUGENE WADSWORTH BROWN

State of California,
County of Los Angeles—ss.

Richard C. Thompson, being first duly sworn, deposes and says:

That he was at all times herein mentioned, Special Agent of the Federal Bureau of Investigation, and during the month of December, 1942, he was then and there assigned to the Los Angeles offices of said Bureau.

That in this particular case, affiant, at the time of making the arrest of defendant Brown, had with him the original Bench Warrant which has now been filed in the herein matter. That upon approaching the apartment of defendant Brown,

affiant informed defendant Brown that he and several of the parties with him were Federal agents; that he had a warrant for his arrest and had come to make his arrest in connection with this case; whereupon, defendant Brown permitted affiant and the accompanying agents to enter the apartment. That the Bench Warrant was displayed to defendant Brown and was read by him. That after defendant Brown had been informed that he was under arrest, affiant advised him, as a part of said arrest, a search would be made of [68] his apartment, which apartment defendant Brown conceded was his apartment, to see if there was then and there present any seditious literature or material that had been used in conjunction with Mankind United since the entry of the United States into the war, or any material which had been a part of the conspiracy as charged to violate the Espionage Act.

That defendant Brown at no time objected to any search being conducted; his only statement was that he inquired whether such a search was a procedure allowable under the Constitution, and as to whether we, the agents, were justified in making the search. We advised him that we believed we were not only justified, but it was our duty to make the search incident to the arrest. The search was then and there conducted.

That at the time of said arrest, the whole of the apartment appeared to be an office rather than a typical dwelling place, although there was in the living room an in-a-door bed. In said apart-

ment there was located a typewriter, adding machine mimeograph, filing cabinets and various other articles that are frequently associated with office work. Most of the material obtained from said apartment was either in plain view or after having noted material in plain view pertaining to Mankind United, the other material was readily accessible in said apartment. With respect to the lock-box referred to in Brown's petition, after some discussion, the defendant Brown found a key which opened said box. The data therein contained was inspected, but none of it was retained; in the box was a certain amount of currency, in all over $844; this money was placed in the lock box, and this lock box, for the purpose of safekeeping was taken down to the County Jail and deposited with the jailor, together with its contents. Affiant was informed and believes, and therefore alleges that upon defendant Brown's making bail and being released from custody, said lock box and all its contents, including the money, was returned to defendant Brown—at least none of the material therefrom was retained by the agents of the Federal Government. [69]

Affiant verily believes that all the material retained as an incident to said search pertained to Mankind United, and was of the nature of material and documents referred to in the charges of the indictment; that no effort was made to retain any personal or private documents of defendant Brown.

That after the arrest of defendant Brown and

the search as an incident thereto, defendant Brown was taken from said apartment to the County Jail, leaving the apartment in the early afternoon, and was booked at the County Jail at approximately 2 o'clock p.m. on December 18, 1942.

RICHARD C. THOMPSON,
Affiant.

Subscribed and sworn to before me, this 2 day of December, 1943.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court.
Southern District of California.
By JOHN A. CHILDRESS,
Deputy.

[Endorsed]: Filed Dec. 4, 1943. [70]

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT T. PUGH (FBI AGENT) IN REPLY TO PETITION OF MRS. SHANNA JAKEMAN

State of California,
County of Los Angeles—ss.

Robert T. Pugh, being first duly sworn, deposes and says:

That he was at all times herein mentioned a Special Agent of the Federal Bureau of Investigation, and during the month of December, 1942, was then and there assigned to the Los Angeles office of said Bureau.

That affiant, together with two other agents of the Bureau, conducted the arrest of defendant Shanna Jakeman, the same taking place at the hour of 7:30 a.m. on December 18, 1942.

The details pertaining to said arrest are as follows:

Upon calling at the address of 503 South Union Drive, Los Angeles, California, at apartment 307 of said address, one of the agents proceeded to knock upon the door, whereupon after a few moments, defendant Mrs. Jakeman came to the door, and in my presence, agent Garvey told Mrs. Jakeman that we were all Federal officers and had a warrant for her arrest. [71]

We then entered the apartment and told her she would have to make herself ready to be taken into custody. She inquired as to the charges, and it was explained to her that she was charged with conspiracy to commit sedition, and the Bench Warrant was shown to her and she read it.

Mrs. Jakeman then said that she was ill; we then inquired as to the nature of her illness, and she stated that she had a slight cold, but further stated that she had been out of her apartment the day before to go to the store, and that she was not under the care of a doctor; the last time she had seen a doctor was six weeks prior thereto.

Inquiry was then made of her as to whether there was any other person present in the apartment, and she said that her son was there. Whereupon, one of the agents knocked upon an adjoining door and woke the son, who then dressed and came

into the main room of the apartment, where his mother was. The name of the son is Max Wells Jakeman, hereinafter referred to as son. The son then prevailed upon his mother to go into the bathroom and get dressed, which she did, returning shortly thereafter to the main room.

Prior to the arrest in question, I had attended a conference of the Federal Bureau of Investigation, where, among other things, I had been apprised of the nature of the extensive investigation being conducted by the Federal Bureau of Investigation throughout the state of California, of the activities of a seditious nature, of various persons in conjunction with a movement known as Mankind United.

The general nature of the charges had been explained to me, and likewise the general type and character of literature and material being utilized by various co-defendants, in the furtherance of the objects of their conspiracy.

The general nature of the proposed charges that we believed that the grand jury would return had likewise been explained to me, and in making the search and seizure, we agents confined our search to those articles pertaining to charges referred to in the indictment and the charges brought against the various defendants. [72]

It is true we explained to Mrs. Jakeman that if she was willing we would like to have her come to the offices of the Federal Bureau of Investigation for the purpose of an interview. She stated that she had no objection to doing so, and was quite

willing to go to our offices, prior to being lodged in the County Jail. She was taken to our offices, and in a very orderly and courteous manner was interviewed, for a period of about two hours, during all of which interview a feminine stenographer of the Federal Bureau of Investigation was present.

We repeatedly asked Mrs. Jakeman if she cared to partake of food and she stated that she did not, but after concluding the interview at the office at about the hour of 12:30 p.m. of December 18, 1942, Mrs. Jakeman was then taken out of the office for lunch, and directly thereafter in the early afternoon of December 18, 1942, booked at the Los Angeles County Jail as a prisoner for the United States Marshal of this district.

The total time we were at Mrs. Jakeman's apartment was from about 7:30 a.m. until about 11 o'clock a.m.

ROBERT T. PUGH,
Affiant.

Subscribed and sworn to before me this 2d day of December, 1943.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court.
Southern District of California.
By JOHN A. CHILDRESS,
Deputy.

[Endorsed]: Filed Dec. 4, 1943. [73]

[Title of District Court and Cause.]

AFFIDAVIT OF ADAM E. WOLF (FBI AGENT) IN REPLY TO PETITION OF PAULINE L. KELSO

State of California,
County of Los Angeles—ss.

Adam E. Wolf, being first duly sworn, deposes and says:

That he was at all times herein mentioned, a Special Agent of the Federal Bureau of Investigation, and during the month of December, 1942, he was assigned to the San Diego office of the Federal Bureau of Investigation.

That affiant, together with Swanson another agent of the Federal Bureau of Investigation and also accompanied by a matron from the San Diego Police Department, participated in the arrest of defendant Kelso in connection with the herein matter. That said arrest took place at about the hour of 7:30 a.m., December 18, 1942, at the residence of said defendant, to wit: 1718, Union Street, San Diego, California.

That prior to making the arrest, affiant attended a conference conducted by Special Agent Earl P. Staten at the office of the Federal Bureau of Investigation in San Diego, at which time and place there were then and there present other agents of said Bureau; that said conference took place a few days prior to the arrest in question; that [74] at the conference affiant was advised that the Federal Bureau of Investigation had conducted

an extensive investigation of certain persons whose names were ultimately included as defendants in the herein indictment.

Affiant was further advised that testimony had been submitted to the Federal grand jury at Los Angeles pertaining to the activity of defendant Kelso, and others, in conjunction with an alleged conspiracy growing out of the activities of a movement known as Mankind United, and that said parties were believed to have violated the Espionage Act of the United States, namely 50 U.S.C.A. Section 33, by reason of a conspiracy existing between said parties.

That at said conference, affiant was advised of the general nature of the charges proposed to be contained in the indictment and of the literature and pamphlets and other articles to be utilized by the proposed subjects in the furtherance of their conspiracy to make seditious utterances.

That it was further explained that arrests were to be made throughout the state of California at various places and as near as possible all of said arrests would be made around 7:30 a.m. on the morning of December 18, 1942, so as to avoid any premature publicity. That affiant had with him the original Bench Warrant issued by the herein court at the time of making the arrest in question.

That upon knocking upon the door of the dwelling occupied by defendant Kelso at about the hour of 7:30 a.m., December 18, 1942, a woman came to the door, and affiant inquired of said

woman as to the whereabouts of defendant Kelso, and the woman replied that Mrs. Kelso was still in bed; whereupon affiant produced his credentials and identified himself as an agent of the Federal Bureau of Investigation and was permitted to enter said premises, accompanied by the matron and the other agent and they were permitted to sit in the living-room of said dwelling house until defendant Kelso could attire herself and come into the room.

That upon defendant Kelso's coming into the room, affiant identi- [75] fied himself as a Federal officer and Agent Swanson displayed to defendant Kelso the original Bench Warrant issued in the herein matter for the arrest of defendant Kelso and advised her she was then and there under arrest. Affiant advised defendant Kelso that she was charged, with certain other persons, of entering into a conspiracy to violate the Espionage Act and that an indictment had been returned, and as a part of his duty he was directed to make a search of her premises to ascertain whether there was any literature or material of the type or character referred to in the charges that had been brought. That defendant Kelso stated no such search should be made, and affiant advised her he was duty bound to make such a search and, together with the accompanying agents, made a search of the premises which were actually under the control of defendant, and after having conducted the search there was then and there secured certain articles and documents pertaining to Mankind United.

That, as heretofore stated, affiant did in fact

actually produce a Bench Warrant for the arrest of defendant Kelso. That the search of said premises was conducted in a courteous and orderly fashion, and it was apparent in examining said rooms that considerable material pertaining to Mankind United was then and there present in the dwelling occupied by the defendant, although only a small portion thereof was actually seized and taken. Affiant verily believes that all the material secured pertained to Mankind United, and it has a correct relation to the accusations contained in the indictment, the details of which had been rather fully explained to your affiant prior to making the arrest in question as a part of his duty as an agent in conjunction with the herein matter.

That on the same morning in question, after making the arrest and search, defendant Kelso was taken to the County Jail in the city of San Diego, by the agents, and booked as a prisoner for the United States Marshal.

ADAM E. WOLF,
Affiant. [76]

Subscribed and sworn to before me, this 3 day of December, 1943.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court.
Southern District of California.
By JOHN A. CHILDRESS,
Deputy.

[Endorsed]: Filed Dec. 4, 1943. [77]

[Title of District Court and Cause.]

AFFIDAVIT OF EARL P. STATEN (FBI AGENT), IN OPPOSITION TO PETITION OF HOMER G. WILCOX

State of California,
County of Los Angeles—ss.

Earl P. Staten, being first duly sworn, deposes and says:

That he is and was at all times herein mentioned a Special Agent of the Federal Bureau of Investigation, and assigned to the San Diego office of such Federal agency;

That affiant on the morning of December 18, 1942, together with other officers of the Federal Bureau of Investigation, went to the home of the defendant Wilcox at 1716 Union Street, San Diego, which place is a flat divided into four separate units, and first knocked on the back door of said premises, and after waiting a few moments, the defendant Wilcox appeared at the door, at which time your affiant advised said defendant Wilcox that he was an officer of the Federal Bureau of Investigation, as were the men with him, and that he had with him a warrant for his arrest and that he had come to make the arrest of the defendant Wilcox, and visibly displayed to the defendant Wilcox the Bench Warrant for his arrest, and allowed said Wilcox to take the warrant and read the same, which affiant observed Wilcox so [78] doing.

That defendant Wilcox thereupon stated that he did not wish to have his premises searched, but your affiant advised said defendant that as an in-

cident to the arrest, it was his duty to make a search of his premises to ascertain whether or not there was any literature, pamphlets, documents, books, or other articles of the class referred to in the accusation that had been brought against him, or in the indictment; and told him that he was duty bound to search the premises for articles of a seditious nature or articles that might have been utilized by said defendant in said enterprise.

Whereupon your affiant and the other three agents who accompanied him went into the front room of said flat. A general description of said rooms is as follows: Said rooms are divided merely by a large opening; they have all the appearance of being an office or meeting place; that several of the walls have shelves on which were stacked books, magazines, pamphlets, etc; that there was located in said rooms a mimeograph machine, typewriter, mailing devices, stationery supplies, desks, tables, etc. There was in plain view a large number of pamphlets and literature that affiant through his investigation knew had been utilized in conjunction with the activities of the Mankind United movement; that a search was made of said premises,

That at all times a very orderly attitude was maintained; courtesy was extended to the defendant and the agents working in conjunction with your affiant made a search of the premises merely for articles that were material to the accusations made in the indictment; no effort was made to take any

personal or private papers belonging to said defendant Wilcox, and while your affiant is unable to state just [79] which documents or papers seized at said place were most obviously in plain view, he does affirm that all of said documents were conspicuous and noted in the rooms of the dwelling house in which defendant Wilcox stated he was then and there residing, and in which place affiant, from previous knowledge, knew defendant Wilcox was residing, and also using as his office.

That among said documents were motion picture films, maps and stereoptican slides; that all of said documents and articles to affiant's best knowledge and belief were pertinent to the activities of defendant Wilcox and the co-conspirators in connection with their association with the activity known as Mankind United and of the character of those documents referred to in the indictment.

That a search of the premises took approximately 3½ hours, during all of which time said Wilcox was arguing and discussing with the agents concerning their search and method of searching; that at no time from the arrest of said Wilcox did said Wilcox suggest, request or demand of affiant or any agent of the Federal Bureau of In-

vestigation that he be immediately or otherwise booked by said affiant or anyone else.

EARL P. STATEN,
Affiant.

Subscribed and sworn to before me, this 3 day of December, 1943.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court.
Southern District of California.
By JOHN A. CHILDRESS,
Deputy.

[Endorsed]: Filed Dec. 4, 1943. [80]

[Title of District Court and Cause.]

AFFIDAVIT OF HOWARD H. DAVIS (FBI AGENT), IN REPLY TO PETITION OF BAY BURNS SHARP

State of California,
County of Los Angeles—ss.

Howard H. Davis, being first duly sworn, deposes and says:

That he was at all times herein mentioned a Special Agent of the Federal Bureau of Investigation, and during the month of December, 1942, he was then and there assigned to the Los Angeles office of said Federal Bureau of Investigation.

That your affiant, together with an agent of the Federal Bureau of Investigation, and a city detective of the city of Fresno, at about the hour of 8:07 a.m. on December 18, 1942, called at the de-

fendant Sharp's residence, to wit: 1237 "R" Street, Fresno, California, which is a five-room dwelling house.

That at said time and place, affiant had in his possession the original Bench Warrant for the arrest of defendant Sharp, which warrant now reposes in the files of the herein case, and upon the reverse side of which warrant appears a return made by affiant.

That prior to making the arrest, affiant had discussed with several of his co-associates in the Federal Bureau of Investigation, the [81] nature of the investigation being conducted pertaining to the activities of defendant Sharp, and other proposed co-defendants; that affiant had offices in the same room as agent Edward Furbush who had been assigned to work upon this case for a period of approximately 6 or 8 months last past and had frequently discussed with him said case and investigations that were being conducted in Los Angeles, the Fresno area, San Diego and at San Francisco.

That on the morning of December 17, 1942, affiant attended a conference at the offices of the Federal Bureau of Investigation, conducted by the agent in charge, at which time there was then and there present Patrick Horgan, Special Agent of the Federal Bureau of Investigation, and various other agents, and the purpose of said conference was to explain procedure that was to be had in event the grand jury returned an indictment in the herein matter.

That at said conference, among other things, it was explained to affiant by his then superiors, that the program to be followed in connection with the arrest of various defendants who might be indicted by the grand jury, was that they should all be apprehended as nearly as possible in the early morning of December 18, so that no premature publicity would arise, as might be the case in event they were apprehended over an extended period of hours; that at said conference it was further explained that this was an important matter, the charges were serious, and that the proposed defendants were persons who had been working together in a conspiracy to violate the provisions of the espionage act by reason of making seditious utterances and distributing literature, books, letters, and pamphlets under the name of an activity known as Mankind United. That it was then and there explained that as soon as final word had been received of the return of the indictment in the herein case, that warrants would be provided so that the agents could make the arrests in this district of the defendants residing in this district, after having received the warrants.

It was further explained at that conference that after making the arrest, as an incident to the arrest, that it was our duty and it was [82] proper for us to search the premises of each of the defendants for articles, books, letters, and documents then within the immediate possession or control of the premises that each of the defendants were occupying, which were of a seditious nature, or

that pertained to the activities of Mankind United; it being explained that all of such documents and articles pertaining to Mankind United were being utilized by the various proposed co-conspirators and by others in the furtherance of their seditious activities.

The text of the Sedition Statute, namely 50 U.S.C.A. Section 33, was explained to the agents then present at said conference, and the general nature of the charges in the proposed indictment were likewise explained to the agents then and there present.

I was assigned to proceed to Fresno, California, to await further orders, and to await receipt of the Bench Warrants expected in the herein case. I then went to Fresno, and in the evening of December 17, 1942, the original Bench Warrant for the arrest of the defendant Sharp was brought to the Fresno office of the Federal Bureau of Investigation.

I received instructions from the Los Angeles office to make the arrest in the early morning of December 18, as nearly as possible between the hours of 7:30 and 8:00 a.m. On the morning of December 18, as previously planned, I called at the residence of defendant Sharp, knocked at the door and Sharp came to the door, at which time and place I, in substance, advised defendant Sharp that I was a Federal officer and agent of the Federal Bureau of Investigation, and that I had come to make his arrest. I then and there displayed the original Bench Warrant for his arrest.

I then entered the premises with two other officers, at which time and place there was then and there handed to defendant Sharp the original Bench Warrant which he took and read; I then told Sharp he was under arrest and the charges against him were for seditious activities. I advised him to get dressed, and after he had dressed I told him we were directed to make a search of his premises in connection with the charges that had been brought against him, and affiant, to- [83] gether with the other officers, proceeded to make a search of the premises.

Upon entering the rooms of Sharp's dwelling house, it was very evidence that there were considerable pamphlets, material, drawings and charts pertaining to Mankind United, which were in open and plain view. We then proceeded to examine the books, documents, papers and articles then and there present, and after making a careful examination selected certain documents and articles. Defendant Sharp was booked with the Deputy United States Marshal of Fresno, California, in the Federal Building, at about the hour of 9:30 a.m., on December 18, 1942. No effort was made to take any personal papers or property belonging to defendant Sharp excepting those directly referring to seditious matters or to the activities of Mankind United.

That at the time defendant was booked by the United States Marshal, he had with him a brief case which he was carrying, and a search was made of it at the office of the United States Marshal.

and there was then and there taken from it documents, articles and material referring to Mankind United, or its activities, which documents were likewise retained. That said arrest and the search incident thereto was done in an orderly and courteous manner, and that no force was used in connection therewith. Affiant verily believes that all the articles and material taken from Sharp or his premises had a reasonable and direct connection with Sharp and the charges as contained in the indictment.

HOWARD H. DAVIS,
Affiant.

Subscribed and sworn to before me this 3rd day of December, 1943.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court,
Southern District of California.
By J. M. HORN,
Deputy.

[Endorsed]: Filed Dec. 4, 1943. [84]

[Title of District Court and Cause.]

COUNTER AFFIDAVIT OF A. RAY ELSEA

A. Ray Elsea, being first duly sworn, deposes and says:

That he resides at 1405 Laveta Terrace, in the City and County of Los Angeles, State of California;

That affiant has read the affidavit of H. Frank

Angell, Special Agent of the Federal Bureau of Investigation, and filed in support of the defense, and states that same is not a complete statement of the actions of said H. Frank Angell and other special agents of the Federal Bureau of Investigation that arrested your affiant on the 18th day of December, 1942;

That a full and complete statement of what occurred at that time is set forth by your affiant in this counter affidavit;

That at about the hour of 7:00 in the morning of the 18th day of December, 1942, defendants H. Frank Angell, J. Secrist, John Roche and Malcolm Powrie, special agents of the Federal Bureau of Investigation, and Merle Armstrong, a member of the Los Angeles Police Force, forced an entrance into the premises of your affiant, and produced what [85] was purported to be a warrant of arrest;

That your affiant asked to see a warrant for search and seizure;

That said agents produced no warrant for search and seizure but told this affiant that the warrant for his arrest gave them the right to search and seize anything they pleased, and that they—the said agents—knew their rights;

That both your affiant and his wife told said agents repeatedly that they knew their rights under the Constitution of the United States, and warned them about breaking the Fourth and Fifth Amendments to said Constitution;

That prior to this proceeding your affiant has never been charged with, or arrested for, any crime

whatsoever, nor did he commit any crime in the presence of said agents;

That affiant is now over 50 years of age; was born in the United States and is an American citizen;

That he is a student of the doctrines of the "Mankind United" organization, and has been so for more than four years;

That said doctrines of "Mankind United", as studied by this affiant, have nothing of a political or sectarian nature, but are wholly philosophical, based upon the teachings of Christ Jesus as set forth in the New Testament of the Bible, and upon the Golden Rule announced by Christ Jesus in His theory of the right way for all persons to live in this world;

That said Federal Bureau of Investigation agents utterly ignored your affiant's demands that they produce a search and seizure warrant and, without the consent and against the will of affiant said agents searched the entire premises of your affiant, leaving same in the utmost disorder;

That your affiant protested frequently but, without his consent and against his will, said agents made a most thorough search, seizing and taking away from said premises many documents, papers and other personal property belonging to this affiant and his wife; [86]

That after completing their search of your affiant's entire premises, said agents took your affiant to the County Jail;

That said agents remained on affiant's premises

from approximately 7:00 A. M. until 2:15 P. M., during all of which time affiant was held in the custody of said persons who had entered his premises, was not permitted any liberty, nor was he permitted to leave said premises or to notify any outside persons of his imprisonment, nor was he ever brought before any committing magistrate, but was imprisoned and first appeared before the Hon. Harry A. Hollzer, a Judge of the above-entitled Court, on or about the 21st day of December, 1942;

That at no time did your affiant consent to the entry of his premises by said agents, nor to the carrying away by said *agents his* personal documents, papers, etc., but that affiant continually protested against the action of said agents in restraining him in his liberty and forcibly searching his premises and taking therefrom the documents as set forth herein.

A. RAY ELSEA

Subscribed and sworn to before me this 20th day of December, 1943.

[Seal] MABEL A. DOANBURG,
Notary Public in and for the County of Los Angeles, State of California.

Received Copy of the Within Counter Affiavit. This 29th day of December, 1943.

CHARLES H. CARR, A
United States Attorney.

[Endorsed]: Filed Dec. 29, 1943. [87]

[Title of District Court and Cause.]

COUNTER AFFIDAVIT OF MARION J. ELSEA

State of California,
County of Los Angeles—ss.

Marion J. Elsea, being first duly sworn, deposes and says:

That she is the wife of A. Ray Elsea, one of the plaintiffs in the above-entitled action;

On the morning of December 18th, 1942, around 6:50 o'clock affiant's doorbell chimed and Mr. Elsea arose and went to the door;

That affiant immediately arose and started to get dressed when steps came close to her bedroom door and affiant stepped behind the door, and as the door was pushed in your affiant pushed it back, at the same time calling out. Affiant's husband said, "Do not go in there, my wife is there"; that the door was again pushed and affiant again pushed it back saying, "stop"; that affiant then grabbed a dressing gown and came out into the living room;

That in the living room of affiant's home, four men later began grabbing papers from your affiant's desk, scattering papers and books [88] everywhere, stuffing them into their pockets and piling them in a heap;

That your affiant said to said agents, "Gentlemen, you have a warrant for my husband's arrest, so you say—but you have shown no search and seizure warrant to either me or my husband, and I believe you had better cease rummaging around

and messing things up, for we know our constitutional rights, and you have no right whatsoever to do this. My husband will go with you, but you will have to stop this unlawful procedure";

That the two agents who were the spokesmen both said that your affiant needn't get up in the air, that they were in affiant's home to search every bit of the house and were going to do it; that they didn't need a warrant;

That your affiant again reiterated that they were breaking the Fourth and Fifth Amendments to the Constitution of the United States;

That this affiant again told said agents that if they were going to search, they would have to have a warrant for search and seizure, stating what they were looking for and in what part of the house they expected to find it;

That during all this time said agents were continuing the search, upsetting the house and everything in it in general;

That in a little back room where your affiant has her office work, one of the agents picked up a Christmas gift from an old friend of affiant's in the East;

That affiant told him he had no right to open the gift or to handle it as it was not addressed to them and it was not yet Christmas and affiant would not open it;

That upon said agent attempting to open said Christmas gift, your affiant grabbed it away from him refusing to allow him to open it;

That said agents took all of your affiant's bookkeeping records and continually asked for things other than what they saw—wanting to know what each thing was, to which your affiant replied that all of said affiant's and her husband's records were plainly marked;

That all of said agents carried guns on their hips.

MRS. MARION J. ELSEA [89]

Subscribed and sworn to before me this 14th day of December, 1943.

[Seal] MABEL A. DOANBURG

Notary Public in and for the County of Los Angeles, State of California.

Received Copy of the Counter Affidavit, This 29th day of December, 1943.

CHARLES H. CARR, A
United States Attorney.

[Endorsed]: Filed Dec. 29, 1943. [90]

[Title of District Court and Cause.]

COUNTER AFFIDAVIT OF MRS. ELIZABETH GLOECKLER

State of California,
County of Stanislaus—ss.

Elizabeth Gloeckler, being duly sworn, deposes and says:

I am the wife of Jacob Gloeckler. Early in the morning of December 18, 1942, in answer to a ring of the door bell Mr. Gloeckler went to the door. Messrs. Mike Cassidy, Walt Butler, John Norris and Paul J. O'Farrell presented credentials that they were Federal Bureau of *Information* agents, and informed Mr. Gloeckler that he was under arrest;

That the said agents did not present any warrant for his arrest, nor any search warrant. They started pulling out drawers and pulled out everything they could find, taking some of our records and literature;

In reply to my inquiry as to whether placing Mr. Gloecker under arrest gave them *to* right to search the house, they said: "Yes, we have arrested him and that gives us the right to search every inch [91] of his premises. We could even pull up the rugs and search, but, if you will cooperate with us, we won't have to do that", or words to that effect;

That said agents remained on the premises for about four hours; that Messrs. Cassidy and O'Farrell came back again that night, but then they were very courteous. They stayed on the porch and asked me if I would invite them in; and I said, "that all depends". They were there on the pretext of getting some clothing for my husband, whom they had taken to jail that afternoon. They asked me for more records and took some more of them; I asked them, "What, actually, have you charged my husband with?" and they said, "The only

charge we have placed against him is that he belongs to a movement known as "Mankind United", which is considered subversive." I told them, "If that's the case, you have a lot of arrests to make." They replied, "No, we don't work that way. We just pick out the leaders."

That during the time said agents were searching our home and before they took Mr. Gloeckler away, they forced under threats both my husband and myself to fill out a questionnaire in our own handwriting and sign the same and, under threat, said agents dictated the answers we were to make to said questionnaire, and said agents took with them the signed questionnaire so dictated by them.

MRS. ELIZABETH GLOECKLER.

Subscribed and sworn to before me this 13 day of December, 1943.

[Seal] H. D. CARLSON,
Justice of the Peace, in and for the County of Stanislaus, State of California.

Received Copy of the Within Counter Affidavit, this 29th day of December, 1943.

CHARLES H. CARR, A
United States Attorney.

[Endorsed]: Filed Dec. 29, 1943. [92]

[Title of District Court and Cause.]

COUNTER AFFIDAVIT OF JACOB GLOECKLER

State of California,
County of Stanislaus—ss.

Jacob Gloeckler, being duly sworn, deposes and says:

That he has read the affidavit of John C. Norris filed in the above-entitled case; that the statements as to the actions of said Norris and other agents of the Federal Bureau of Investigation while on affiant's premises are not true, except as set forth herein;

That affiant is a citizen of the United States, and resides at Denair, Stanislaus County, California;

That prior to the proceedings set forth herein affiant has never been charged with, or arrested for, any crime whatsoever; that he is now over 56 years of age, and earns his living as a farm laborer;

That affiant is a student of the doctrines of the "Mankind United" organization, and has been for more than three years;

That the doctrines of "Mankind United" as studied by your affiant, have nothing of a political or sectarian nature, but are wholly philosophical, based upon the teachings of Christ Jesus as set forth in the New Testament of the Bible, and upon the Golden Rule announced by Christ Jesus in His theory of the right way for all persons to live [93] in this world;

That, without warning, in the early morning of December 18th, 1942, four men, including the defendants mentioned in the complaint in regard to the entry of affiant's premises, showed to your affiant cards of identification as agents of the Federal Bureau of Investigation, at the same time forcing their way into affiant's premises and announced to your affiant that he was under arrest;

That they did not produce any order or arrest, nor was any crime committed by your affiant in the presence of said persons;

That the said men proceeded, against the will and under the protest of this affiant, to search his premises, to-wit a five-room residence;

That they produced no warrant of arrest, nor did they produce any warrant of search and seizure, although affiant and his wife protested against the invasion of their home and against such unlawful search and seizure, and called said persons' attention to the declarations in the Amendments to the United States Constitution against such search and seizure;

That said persons also informed affiant and his wife that they had no warrant for arrest or warrant for search and seizure, but that it was not necessary to have a warrant as they were acting under instructions;

That, after searching the entire premises, and leaving same in the utmost disorder and confusion, they seized your affiant, whom they kept under restraint during the entire time that they had been in his premises, and also seized a great number of

documents and personal property belonging to affiant and his wife, and required by force and under threat your affiant and his wife to fill out a questionnaire in their own handwriting and sign the same and, under threat, dictated the answers they were to make to said questionnaire, and took with them the signed questionnaire so dictated by them.

That said searchers remained upon the premises from approximately 7:30 A.M. to 12:00 M., during all of which time they kept your affiant under restraint; [94]

That said agents removed several boxes of materials from the house, the contents of which the affiant was not informed by said agents, nor was he permitted to make a list of the same;

That said affiant was not taken before any committing magistrate until approximately 2 P.M. on the 21 day of December, 1942, and during said time was not permitted to talk with any person except the persons who had invaded his home;

That at no time did your affiant give his consent to the search and seizure of his private papers and documents as set forth herein, but the same were forcibly seized and carried away against the protest of your affiant.

JACOB G. GLOECKLER.

Subscribed and sworn to before me this 13 day of Deecmber, 1943.

[Seal] H. O. CARLSON,

Justice of Peace in and for the County of Stanislaus, State of California.

Received Copy of the Within Counter Affidavit This 29th day of December 1943.

CHARLES H. CARR, A
United States Attorney.

[Endorsed]: Filed Dec. 29, 1943. [95]

[Title of District Court and Cause.]

COUNTER AFFIDAVIT OF PAULINE L. KELSO

State of California,
County of San Diego—ss.

Pauline L. Kelso, being first duly sworn, deposes and says:

That she resides at 1718 Union Street, in the City and County of San Diego, State of California;

That she has read the affidavit of Adam E. Wolf, Agent of the Federal Bureau of Investigation, and that said affidavit is not a completely accurate statement of the arrest of this affiant on the 18th day of December, 1942; that in answer thereto affiant states as follows:

That she is over the age of 21 years; is an American citizen having been born in the United States;

That she is a student of "Mankind United" organization, and has been for nearly four years;

That the dostrines of "Mankind United", as studied by your affiant, have nothing of a political or sectarian nature, but are wholly economic and philosophical, based upon the teachings of Christ Jesus, as set forth in the New Testament of the

Bible, and upon the Golden Rule announced by Christ Jesus in His theory of the right way [96] for all persons to live in this world;

That, without warning, in the early morning of December 18th 1942, two men and one woman forced their way into the premises of your affiant, announcing that they were agents of the Federal Bureau of Investigation, and showed affiant their identification cards; they also announced that your affiant was under arrest;

That said agents did not produce an order of arrest, nor was any crime committed in their presence;

That said two men, without the consent of and against the will of your affiant, proceeded to search the premises in which she lives, to-wit, a living room, a dining room and an alcove room;

That, although said agents at no time produced a warrant of arrest or a search and seizure warrant, they searched the entire premises of this affiant;

That on the evening before said arrest there *had a* meeting of a group of persons studying the teachings of "Mankind United" at your affiant's home, and some of the documents, papers and records concerning said meeting were seized along with other documents and papers this affiant had in her home;

That, after searching the entire premises belonging to your affiant and leaving same in disorder, they took your affiant, together with the documents, papers and records seized by said agents, to the County Jail;

That none of the documents, papers, records or personal property so seized and carried away by said agents were of a seditious nature;

That said agents as set forth in the complaint, falsely imprisoned your affiant in her premises from about 7:30 to 9:30 A. M. December 18th, 1942, when they took this affiant, together with the papers and documents which they had seized, to the San Diego County Jail where, to affiant's knowledge, no charge was made against this affiant, but affiant was confined before being taken before a committing magistrate until noon of the following day, Saturday, December 19th, 1942; [97]

That at no time did your affiant consent to the entry of her premises by said agents, nor to the carrying away by said agents of her personal documents, papers, etc, but that affiant protested against the action of said agents in restraining her in her liberty and forcibly searching her premises and taking therefrom the documents as set forth herein.

PAULINE L. KELSO

Subscribed and sworn to before me this 17th day of December, 1943.

[Seal] EDITH G. BENJAMIN,
Notary Public in and for the County of San Diego, State of California.

Received Copy of the Within Counter Affidavit This 29th day of December, 1943.

CHARLES H. CARR, A
United States Attorney.

[Endorsed]: Filed Dec. 29, 1943. [98]

[Title of District Court and Cause.]

COUNTER AFFIDAVIT OF MAX THEODORE MILLER

State of California,
County of Santa Clara—ss.

Max Theodore Miller, being duly sworn, deposes and says:

That he resides at 1264 Latham Street, Mountain View, Santa Clara County, California;

That he has read the affidavit of Louis D. Wine, Special Agent of the Federal Bureau of Investigation, and filed in support of the defense, and states that same is not a complete statement of the actions of said Louis D. Wine and other special agents of the Federal Bureau of Investigation that arrested your affiant on the 18th day of December, 1942;

That a full and complete statement of what occurred at that time is set forth by your affiant in this counter affidavit;

That in the early morning of December 18th, 1942, about 8:00 A. M., the doorbell rang and your affiant's wife went to the door.

Affiant's wife called him, and he went to the door and there [99] were two men standing on the porch who said they were agents of the Federal Bureau of Investigation; that one of them whose name, your affiant afterwards learned, was Louis D. Wine, told affiant that he was under arrest, and demanded admittance;

That your affiant asked to see a warrant for his

arrest and warrant to search his home; that said agent told affiant that they were in San Francisco or Los Angeles—that the men did not have them in their possession; that your affiant then told these men that he would not admit them to his home without seeing the warrants;

That this affiant asked the leader why they wanted to take him into custody, to which he replied, "For sedition"; that affiant then asked for a specific instance; that said agent answered, "I do not know. I have not seen a warrant;"

That this man, whom affiant afterwards knew as Mr. Wine, said "I want you to co-operate with me. We knew that you would resist arrest. We were told that you would ask to see a warrant and would try to prevent us from searching the house.";

That Mr. Wine stated that they would go and get the warrants, but in the meantime a guard would be thrown around the house and that all the neighbors would know about it, and no one would be permitted to leave or enter;

That your affiant told the agent that it was quite all right and the men left;

That they returned within approximately five minutes, and Mr. Wine told your affiant that he had called San Francisco and had received instructions to take whatever steps were necessary;

That Mr. Wine told your affiant he was under arrest and pointed a revolver at affiant, ordering him to throw up his hands; affiant complied immediately, after which he was again told to "stick

'em up," following it with an order that affiant open the door, with which order affiant also complied;

That two of said agents entered, putting handcuffs on your affiant, and then started to search;

[100]

That these agents asked your affiant if he had a gun on him, a. ran their hands over his body; affiant told said agents that they would find no weapons in his home;

That the two men then called outside and two more men entered the house, going through the living room into the kitchen and into affiant's wife's bedroom;

That the agents showed affiant identification cards that they were agents of the Federal Bureau of Investigation;

That your affiant never saw any warrant of arrest, nor was any crime committed by said affiant in the presence of said agents;

That affiant was never shown any search warrant, but that without affiant's consent and against his will, they searched affiant's premises including bedroom, office, living room, hall and basement;

That your affiant continually protested against their actions, including their searching all of the rooms of his house and affiant told said agents that he understood the Constitution of the United States stated that they had to have a search warrant showing the particular articles to be seized;

That said agents said that was not necessary; that they were acting under instructions;

That said agents took turns standing guard over

your affiant, each one putting his hand in his coat pocket, as if holding a revolver;

That a special delivery letter and a registered letter arrived while these agents were searching affiant's home; that, before permitting said affiant to touch the registered letter, Mr. Louis D. Wine ripped open the envelope and glanced through the contents;

That your affiant never saw the special delivery letter after it came.

That later, a man whom your affiant believes to be the Chief of Police came in and looked at affiant and said, "I have never seen you before"; affiant replied, "No, I have not been in Mountain View very long"; that, in fact, affiant and his wife had moved into that particular [101] house late in May;

That affiant told the party whom he believes was the Chief of Police, that he could go to Palo Alto, six or seven miles away, and get all the information he wanted about your affiant, because affiant was born and raised there;

That said agents searched affiant's entire premises, leaving the same in the utmost disorder;

That said agents remained on affiant's premises from about 8:00 A.M. until 12:30 P.M., during all of which time said affiant was held in the custody of said persons who had entered his premises, was not permitted to any liberty, nor was he permitted to leave said premises or to notify any outside persons of his imprisonment, nor was he brought before any committing magistrate until about the

hour of 2:00 o'clock on the 21st day of December, 1942;

That said agents removed from your affiant's premises three or four boxes of material, of the contents of which affiant nor his wife were not allowed to make a list;

That during the time affiant was held in custody by said agents in his home, one of the agents took a number of flashlight pictures;

That at no time did your affiant consent to the entry of his premises on the 18th day of December, 1942, nor to the carrying away of the personal documents of himself and wife, taken by these defendants, or any other agents of the Federal Bureau of Investigation, but that affiant continually protested against the action of said agents in restraining him in his liberty and forcibly searching his premises and taking therefrom the documents as set forth herein.

MAX THEODORE MILLER

Subscribed and sworn to before me this 15th day of December, 1943.

[Seal] WILLIAM P. WRIGHT,
Notary Public, in and for the County of Santa Clara, State of California.

My Commission Expires Oct. 18, 1946.

Received Copy of the Within Counter Affidavit, This 29th day of December, 1943.

CHARLES H. CARR, A
United States Attorney.

[Endorsed]: Filed Dec. 29, 1943. [102]

[Title of District Court and Cause.]

COUNTER AFFIDAVIT OF MRS. VIRGINIA S. MILLER

State of California,
County of Santa Clara—ss.

Mrs. Virginia S. Miller, being duly sworn, deposes and says: I am the wife of Max Theodore Miller.

We live at 1264 Latham Street, Mountain View, Santa Clara County, California.

Early in the morning of December 18th, 1942, my doorbell rang, waking me up. There were two men at the door. They asked if Max Miller was at home. I said, "Yes", and asked them what they wanted to see him for. They said that they were from the Federal Bureau of Investigation and that they had instructions from the United States District Attorney to arrest Max Miller on a felony charge and they demanded admittance into my home. I asked them if they had a search warrant. They showed me what I believed to be identification cards, but which I could not read in the dark through the locked screen dor. I asked if that was a search warrant or if that was their identification, and they admitted that it was only their identification. Ther names, I believe, were Louis D. Wine, and John W. Schaller; [103]

I again asked them if they had a search warrant, and they said that they did not have one with them. They said they did not need one, that they

were Federal Bureau of Investigation agents, and that the warrant for arrest of Mr. Miller was in Los Angeles. I told them that I was aware of my rights under the Constitution, and knew that they also were aware of my rights, and that I would not admit them into my home without a search warrant.

They said they were not there to argue with me, that they wanted to see Mr. Miller. I said I would call him, and—closing the front door—I went to do so.

While my husband was dressing, I took a copy of the Constitution of the United States to the door and read Amendment IV, pertaining to Search and Seizure, over the repeated interruptions from the one apparently in charge—whom I later learned was Mr. Louis D. Wine—in which he stated that he knew all about it. I asked him if he were above the Constitution, and he said; "No", but that he was acting under instructions.

When my husband came to the door, Mr. Wine told him *what* he was under arrest and again demanded admittance. I believe Mr. Miller asked him what the charge was, and one of them said, "sedition". Mr. Miller asked to see the warrant for his arrest and warrant to search his home and was told that they were in Los Angeles, or San Francisco. Mr. Miller asked how long it would take to get them. One of the men said it would probably take a couple of hours. Mr. Miller stated that he would not admit them to his home without seeing the warrants.

Mr. Wine stated that they would get the warrants, but in the meantime, a guard would be thrown around the house, that all the neighbors would know about it, and that no one would be permitted to leave or enter. Mr. Miller told him that was all right, and the men left.

Shortly thereafter the men returned and demanded to see Mr. Miller. When he appeared, Mr. Wine said that he had called San Francisco and had received instructions to take whatever steps were necessary. [104]

Mr. Wine then told my husband that he was under arrest and I saw him point a gun at Mr. Miller and heard him order Mr. Miller to put up his hands. Mr. *Husband* complied instantly, after which the man again told him to "stick 'em up," following it with an order to open the door, with which my husband complied. The two men entered, put handcuffs on my husband, and then searched him. He told them they would find no weapons in our home.

Then they asked me if I had a gun and turned me around, searching for a weapon. I told them that I had no weapon and would not use one if I had it.

They called outside and two more men entered the house, going through the living room into the kitchen and my bedroom.

They all showed my husband what they claimed were identification cards.

They ordered him—still handcuffed—to sit down on a davenport near the front door, and one of

the men stood over him while the others searched our premises; bedroom, office, living room and hall.

They demanded the key to the basement. I did not see them search there, but when I entered the basemnet later, it was obvious from the disorder that it had been quite thoroughly searched.

I was told that I must sit in the living room and that my husband and I could not converse. I do not know how thorough a search they made from that point on. They shut the office door so I was unable to see the proceedings.

They remained there searching the house and taking therefrom papers and documents, from 8:00 o'clock in the morning until 12:30 in the afternoon. One or another of the men would answer the telephone and door bell when they rang, stating—on occasion—that "Max" was not available.

While they were there the railway expressman and special delivery mail man came, and I was permitted to sign for packages and also for a special delivery letter. The regular mail man came with a registered letter. Mr. Wine handed the receipt to my husband to sign [105] which he did. Without permitting Mr. Miller to touch the letter, Mr. Wine opened it, glanced through the contents, then returned them to the envelope. I do not believe the registered mail was taken from the premises by the Federal Bureau of Investigation agents, although I have not been able to locate the special delivery letter. I do not know what became of it.

During the morning, I asked several times to be

permitted to make myself and my husband some coffee or some breakfast. I was told to sit where I was. They would not permit us to eat while they were there, approximately from 8:00 A.M. to 12:30 P.M., although they knew that we had not had any breakfast.

Sometime during the morning one of the men, Mr. Good I believe, brought a strongbox from the bedroom into the living room, stating that there was some money in it that should be accounted for. Later they counted the money and had my husband check the amount, together with several other small amounts which they found around the house. Before they left Mr. Good prepared a receipt for $1,201.85 which he and Mr. Wine signed, and had my husband verify. The strongbox, the above amount of money, personal documents (including automobile insurance policies and personal possessions of myself), and other records and documents which they found in the strongbox—with the exception of my marriage certificate and my birth certificate, which the agents permitted me to retain—were removed from the premises by Mr. Wine personally.

One of the men brought my pocket-book to Mr. Wine, stating that there was money in it. Mr. Wine proceeded to search my pocket-book, removing several receipts, including a money order receipt and a booklet entitled, "The Law and Gospel of Economics". When I asked Mr. Wine whether or not I was under arrest he said, "No". I then asked him why my liberty was restricted and my

personal possessions removed from my custody. He stated that they were needed for evidence and that he was acting under instructions. In fact, every time I questioned him in connection with searching our property, Mr. Wine [106] stated that he "was acting under instructions," and that he "was not there to argue with me." Mr. Wine did not remove any funds from my pocket-book.

Sometime during the morning Mr. Wine left the premises and returned a few moments later with a man in the uniform of a policeman, to whom he referred as "Chief" (and who may have been the Chief of Police in Mountain View, whose name I have been informed is Excell). The "Chief" wandered around the house and watched the proceedings. In Mr. Wine's presence, I told the "Chief" that as a matter of record, I wished to state that these men had entered my home without a search warrant. Mr. Wine said that my husband had resisted arrest. I later told the "Chief" that my husband had not resisted arrest, but had requested to see the warrant for his arrest. The "Chief" said that he did not have anything to do with it.

When the men left they took three or four boxes of material from the house, of the contents of which I was not informed.

(MRS.) VIRGINIA S. MILLER

Subscribed and sworn to before me this 15th day of December, 1943.

[Seal] WILLIAM P. WRIGHT,
Notary Public in and for the County of Santa Clara, State of California.

My Commission Expires Oct. 18, 1946.

Received Copy of the Within Counter Affidavit This 29th day of December, 1943.

CHARLES H. CARR, A
United States Attorney.

[Endorsed]: Filed Dec. 29, 1943. [107]

[Title of District Court and Cause.]

COUNTER AFFIDAVIT OF BAY BURNS SHARP

State of California,
County of Los Angeles—ss.

Bay Burns Sharp, being first duly sworn, deposes and says:

That at all times mentioned in the complaint and the pleadings herein, affiant was a resident of 1237 "R" Street, in the City and County of Fresno, State of California;

That he has read the affidavit of Howard H. Davis, one of the defendants in the above-entitled suit, and that said affidavit is not a completely accurate statement of the arrest of this affiant at his home on the 18th day of December, 1943; that in answer thereto, affiant wishes to set forth the

facts that occurred at the time of his arrest, as known to him;

That, without warning, in the early morning of December 18th, 1942, that three men, now known to your affiant to be agents of the Federal Bureau of Investigation, forced their way into affiant's premises and announced that he was under arrest, and showed your affiant what was [108] purported to be a warrant of arrest; that at that time said agents were on the front porch of affiant's residence, and that, against affiant's protests and will, said agents pushed their way into your affiant's residence; that said agents did not produce any warrant of search and siezure, or any legal papers purporting to give any officer the right to search affiant's premises or seize any property thereon;

That your affiant is now over the age of 62 years; was born in the United States, and has always been an American citizen; That affiant is a student of the doctrines of the "Mankind United" organization, and has been for more than five years; That the doctrines of "Mankind United" as studied by your affiant, have nothing of a political or sectarian nature, but are wholly economic and philosophical, based on the teachings of Christ Jesus as set forth in the King James' Version of the New Testament of the Bible, and upon the Golden Rule announced by Christ Jesus as the fundamental Universal Divine Law as a guide for mankind in all their relationship with each other;

That during the time your affiant was dressing so that he might obey the warrant of arrest and leave the premises, said agents took a number of

flashlight pictures of affiant and his premises, and then two of said agents took your affiant to the United States Marshal's Office in Fresno, where he was questioned; that they then took him to the Madera County Jail; that on or about the 23rd day of December, 1942, affiant was taken to the Los Angeles County Jail, in the City of Los Angeles;

That your affiant was never taken before any committing magistrate but was imprisoned and first appeared before the Hon. Leon R. Yankwich, a Judge of the above-entitled Court, on or about the 18th day of January, 1943;

That your affiant has been informed and believes that, without any further exhibition of warrant of search and seizure after his removal from his home to prison, at least seven agents of the Federal Bureau of Investigation searched his entire premises, and took away a great number of papers, documents, records and other personal property [109] belonging to your affiant;

That at no time did this affiant consent to the entry and/or search of his premises, or the carrying away of the personal documents belonging to this affiant and taken away, by said agents, or any other agents of the Federal Bureau of Investigation, but that affiant protested again the actions of said agents, as set forth herein.

BAY BURNS SHARP

Subscribed and sworn to before me this 13th day of December, 1943.

[Seal] MABEL A. DOANBURG

Notary Public in and for the County of Los Angeles, State of California.

Received Copy of the Within Counter Affidavit, this 29th day of December, 1943.

CHARLES H. CARR, A
United States Attorney

[Endorsed]: Filed Dec. 29, 1943. [110]

[Title of District Court and Cause.]

COUNTER AFFIDAVIT OF HOMER G. WILCOX

State of Nevada
County of Clark—ss.

Homer G. Wilcox, being first duly sworn, deposes and says:

That at all times mentioned in the complaint and the pleadings herein, he was a resident of 1716 Union Street, in the City and County of San Diego, State of California;

That your affiant is over 55 years of age; was born in the United States, and is an American citizen;

That affiant is a student of the doctrines of the "Mankind United" organization, and has been for more than five years;

That affiant earns his living as a teacher of the doctrines of the "Mankind United" organization;

That the doctrines of "Mankind United", as studied by your affiant, have nothing of a political or sectarian nature, but are wholly philosophical, based upon the teaching of Christ Jesus, as set

forth in the New Testament of the Bible, and upon the Golden Rule announced by Christ Jesus in His theory of the right way for all persons to live in this world; [111]

That prior to this proceeding your affiant has never been charged with, or arrested for, any crime whatsoever;

That your affiant has read the affidavit of Earl P. Staten, one of the defendants in the above entitled suit, and that said affidavit is not a completely accurate statement of the arrest of this affiant on the 18th day of December, 1942; that in answer thereto affiant wishes to set forth the following facts as to what took place at the time of his arrest;

That at about the hour of 7:30 in the morning of December 18th, 1942, the defendants Robert O'Keefe, Earl P. Staten, Robert Montgomery, Newell Williams and Adam Wolf, did force their way into the premises of your affiant;

That when your affiant went to the door and opened it defendant Earl P. Staten and other agent stood there, and the said Agent Staten pulled a paper from his pocket and said he had a warrant for your affiant's arrest on a charge of sedition, and that he, the said Staten, was to look over your affiant's place;

That affiant asked the said Earl P. Staten if he had a saerch warrant, to which Staten replied that he did not need a search warrant with the warrant for arrest;

That when your affiant took hold of the door of his home to prevent said agents entering, said Agent Staten quickly forced the door open and

entered the kitchen of your affiant's home with the other agent;

That said Earl P. Staten instructed the other agent to pass through the house and open the front door and admit other agents of the Federal Bureau of Investigation who were waiting there into your affiant's home;

That never at any time did the said agent Earl P. Staten state to your affiant that, as an incident to affiant's arrest, it was said agents' duty to make a search of affiant's premises to ascertain whether or not there was any literature, pamphlets, documents, books, or other articles of the class referred to in the accusation that had [112] been brought against your affiant, or in the indictment; that said agent never, at any time, told this affiant that he, the said agent, was duty bound to search the premises for articles of a seditious nature or articles that might have been utilized by said affiant in said enterprise;

That when the said agent returned from the front door, after admitting the other agents awaiting entrance there, said Earl P. Staten told the said agent to sit down with your affiant in the kitchen while affiant read the warrant for his arrest;

That, after reading said warrant, your affiant went to the front apartment of his home where he saw Agent Robert Montgomery looking through the contents of large envelopes and boxes belonging to said affiant; that the said Montgomery produced his identification but that another person who was taking pictures of everything in the place did not produce any identification whatsoever;

That while in your affiant's home, said Earl P. Staten's manner was extremely arrogant and egotistical, while Mr. O'Keefe and Mr. Montgomery, with whom your affiant conversed, were courteous; that said agent Staten used affiant's telephone without asking affiant's permission, while Mr. O'Keefe asked permission to use affiant's typewriter;

That said Federal Bureau of Investigation agents opened doors, boxes and packages, and demanded your affiant's keys to go through affiant's garage and shed;

That your affiant called said agents' attention to the Fourth and Fifth Amendments to the United States Constitution in regard to search and seizure, but one of the agents replied, "You may think you knew what your rights are under the Constitution, but I know what rights are given to me by Congress.";

That said agents proceeded, without the consent and against the will of this affiant, to search his entire premises; that they then proceeded to seize and take away papers and documents, together with moving picture films, stereopticon slides, maps, etc., including many [113] personal and private papers and documents of your affiant;

That, after searching the entire premises, and leaving same in disorder, said agents seized your affiant and took him, together with all the papers, documents, etc., which they had seized as set forth herein, from the premises;

That said agent Earl P. Staten remained in the affiant's home for approximately two hours, leav-

Judgment entered Apr. 25, 1944. Docketed Apr. 25, 1944. Book 25, Page 141. Edmund L. Smith, Clerk. By P. D. Hooser, Deputy.

[Endorsed]: Filed April 25, 1944. [122]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the plaintiffs in the above entitled cause, and each of them, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered in this action on the 25th day of April, 1944, dismissing the complaint.

Dated this 28th day of April, 1944.

LORRIN ANDREWS and
A. L. WIRIN
By A. L. WIRIN
Attorneys for Plaintiffs

Seen:

CHARLES H. CARR,
United States Attorney
By J. STEWART. [123]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Case No. 2850 R.J. Civil—Complaint for damages for false imprisonment and unlawful search and seizure.

Whereas, Arthur L. Bell, et al, of the State of California, is about to appeal to the Circuit Court

of Appeals for the Ninth Circuit from the judgment of dismissal entered April 25, 1944:

Now, Therefore, in consideration of the premises and of such appeal the undersigned, National Automobile Insurance Company, a corporation organized and existing under and by the virtue of the laws of the State of California, as Surety, does hereby undertake and promise on the part of the Appellant that said Appellant will pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, not exceeding Two Hundred Fifty and No/100 Dollars, ($250.00), to which amount it acknowledges itself bound.

In Witness Whereof, the said National Automobile Insurance Company has caused this obligation to be signed by its duly authorized Attorney-in-Fact at Los Angeles, California, and its corporate seal to be hereto affixed, this 28th day of April, 1944.

[124]

[Seal] NATIONAL AUTOMOBILE INSURANCE COMPANY

By LLOYD H. JOHNSTON

Attorney-in-Fact

Examined and Recommended for Approval, as provided in Rule 13.

A. L. WIRIN

Attorney

By J. NIETZ

ing the other agents to carry out the search and seizure of affiant's property, after he, the said Earl P. Staten, departed at approximately 9:30 A.M.;

That during all the time said agents were carrying on their search and seizure of affiant's property, this affiant was imprisoned in his own home, as a prisoner of said agents;

That the above-named agents arrived at affiant's home at approximately 7:30 A.M., and affiant was detained against his will and without his consent at his said home by the persons named in this affidavit until the hour of 11:30 A.M.; that affiant was kept a prisoner in said premises during all of said time without being taken before a committing magistrate;

That at no time did this affiant consent to the entry of his premises, nor to the carrying away of the personal documents belonging to this affiant and taken by these defendants or any other agents of the Federal Bureau of Investigation, but that affiant continually protested against the action of said agents in restraining him in his liberty and forcibly searching his premises and taking therefrom the documents as set forth herein.

HOMER G. WILCOX

Subscribed and sworn to before me this 24th day of December 1943.

[Seal] MARY GIBSON,

Notary Public in and for the County of Clark, State of Nevada. [114]

Received Copy of the Within Counter Affidavit This 29th day of December, 1943.

CHARLES H. CARR, A
United States Attorney

[Endorsed]: Filed Dec. 29, 1943. [115]

[Title of District Court and Cause.]

COUNTER AFFIDAVIT OF SHANNA T. JAKEMAN

State of California
County of Los Angeles—ss.

Shanna T. Jakeman being first duly sworn, deposes and says:

That at all times mentioned in the complaint and the pleadings herein, affiant resided in Apartment 307 at 503 South Union Drive, in the City and County of Los Angeles, State of California;

That she has read the affidavit of Robert T. Pugh, one of the defendants in the above-entitled suit, and that said affidavit is not an accurate statement of the actions of said Robert T. Pugh and other special agents of the Federal Bureau of Investigation that arrested your affiant on the 18th day of December, 1942;

That a full and accurate statement of what occurred at that time is set forth by your affiant in this counter affidavit;

That without warning in the early morning of

December 18th, 1942, three men came to the door of the partment where your affiant resided;

That at that time your affiant was in bed, being quite ill, having been in that physical condition for about ten days, and it was with [116] great difficulty that she arose and went to the door;

That affiant asked the men what they wanted, and they told her they had come to arrest her;

That the men pushed their way inside and told her that they were Federal Bureau of Investigation agents;

That said agents did not produce a warrant of arrest, nor a search and seizure warrant, but proceeded to search the premises of your affiant, consisting of living room, kitchen and bathroom;

That prior to this proceeding your affiant has never been charged with, or arrested for, any crime whatsoever, nor did she commit any crime in the presence of the said agents;

That affiant is now over 21 years of age; was born in the United States, and is an American citizen;

That affiant is a student of the doctrines of the "Mankind United" organization, and has been for more than three years;

That affiant is a housewife, taking care of her home;

That the doctrines of "Mankind United" organization as studied by your affiant, have nothing of a political or sectarian nature, but are wholly educational and economic, based upon the Golden Rule;

That the above-mentioned persons who entered this affiant's premises on the 18th day of December,

1942, proceeded, without the consent of, and against the will of your affiant to search her premises for documents, records and papers which were the personal property of this affiant;

That while in affiant's apartment, said agents presented to your affiant a paper and told her that if she did not sign the same they would get a warrant and it would be hard for her; that under duress affiant signed said paper;

That affiant's son asked said agents if they had a warrant to search and seize, to which they replied that they did not, but that the showing of their cards of identification was sufficient;

That said agents remained in your affiant's apartment for about five hours, searching same, without the consent and against the will [117] of affiant;

That during all of said time your affiant was imprisoned in the living room of her apartment, by said agents; that affiant was not permitted any liberty, nor was she permitted to leave said living room or to notify any outside person of her imprisonment;

That at about 12:30 P.M., after searching the entire premises, said agents took your affiant, with the papers, documents and other personal property which they had seized, to an office on Spring Street, in the City of Los Angeles, where they asked affiant a great number of questions;

That said agents told your affiant that she was not compelled to answer their questions, but that it would be better for her if she did;

That your affiant was kept in the Spring Street Office for approximately 1½ hours, at which time

affiant became so faint and ill from lack of nourishment that said agents took her out to lunch, after which, without informing her where they were taking her, they took your affiant to the County Jail;

That your affiant was never taken before any committing magistrate, but was imprisoned and first appeared before the Hon. Harry A. Hollzer, a Judge of the above-entitled Court, on or about the 21st day of December, 1943.

That at no time did this affiant consent to the entry of her premises; that at no time did affiant willingly consent to the search of her apartment, or to the carrying away of the personal documents belonging to her and taken by these defendants, as set forth herein.

SHANNA T. JAKEMAN

Subscribed and sworn to before me this 13th day of December, 1943.

[Seal] MABEL A. DOANBURG
Notary Public in and for the County of Los Angeles, State of California.

Received Copy of the Within Counter Affidavit This 29th day of December, 1943.

CHARLES H. CARR A
United States Attorney

[Endorsed]: Filed Dec. 29, 1943. [118]

At a stated term, to wit: The September Term, A. D. 1943 of the District Court of the United States of America, within and for the Central

Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 17th day of January in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Ralph E. Jenney, District Judge.

[Title of Cause.]

No. 2850-RJ Civil

ORDER THAT MATTERS STAND SUBMITTED ON BRIEFS ALREADY FILED

The above-entitled causes coming on for hearing on defendants' motion to dismiss and motions for summary judgment; Wm. W. Worthington, Esq., Assistant U. S. Attorney, appearing for the Government; Eloise Mellor, Court Reporter, being present and reporting the proceedings:

It is ordered that these matters stand submitted on briefs already filed. [119]

At a stated term, to wit: The February Term, A. D. 1944 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 20th day of March in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Ralph E. Jenney, District Judge.

[Title of Cause.]

No. 2850-RJ Civil

ORDER GRANTING DISMISSAL

This cause coming on for further proceedings; Lorrin Andrews, Esq., appearing for the plaintiffs; Mildred L. Kluckhohn, Assistant U. S. Attorney, appearing for the defendants; C. W. McClain, Court Reporter, being present and reporting the proceedings;

The Court states that it has no jurisdiction in this case and motion for dismissal is granted. [120]

In the District Court of the United States in and for the Southern District of California, Central Division

No. 2850-RJ Civil

ARTHUR L. BELL, Individually, and as an Associate of and Division Superintendent of "MANKIND UNITED", a Voluntary Association, for and in behalf of said "MANKIND UNITED" and the associates thereof, et al.,

Plaintiffs,

vs.

R. B. HOOD, THEODORE CRUISE, et al.,

Defendants.

JUDGMENT

The above cause having come on for hearing on the 17th day of January, 1944, upon the motions

to dismiss of the following defendants: Theodore Cruise, R. B. Hood, John Roche, Robert T. Pugh, Edward A. Furbush, Earl P. Staten, Howard H. Davis, Robert M. Montgomery, Carl B. Sherman and Dennis G. Smith, the plaintiffs appearing by their attorneys Lorrin Andrews and A. L. Wirin, and the defendants appearing by their attorneys Charles H. Carr, United States Attorney, James L. Crawford and Mildred L. Kluckhohn, Assistant United States Attorneys, and the matter having been submitted on briefs, and the court having been fully advised in the premises; and rendering its opinion in open court on March 20, 1944;

It Appearing to the Court That the court has no jurisdiction, the court, pursuant to 28 U.S.C.A., Section 80, orders the suit dismissed on the ground that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of [121] this court;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the within action be and the same is hereby dismissed pursuant to 28 U.S.C.A. Section 80, on the ground that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court.

Dated this the 24th day of April, 1944.

RALPH E. JENNEY
United States District Judge

Approved as to form:
LORRIN ANDREWS
A. L. WIRIN
Attorneys for Plaintiffs

State of California
County of Los Angeles—ss.

On this 28th day of April, in the year 1944, before me, Ruth E. Harris, a Notary Public in and for said County and State, personally appeared Lloyd H. Johnston, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the National Automobile Insurance Company, and acknowledged to me that he subscribed the name of the National Automobile Insurance Company thereto as principal, and his own name as Attorney-in-fact.

[Seal] RUTH E. HARRIS
Notary Public in and for said County and State.
My Commission Expires Sept. 27, 1947.

[Endorsed]: Filed April 28, 1944. [125]

[Title of District Court and Cause.]

PLAINTIFFS' AND APPELLANTS' STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

The plaintiffs and appellants hereby designate the following points and grounds of appeal:

1. The judgment of the District Court dismissing the complaint for want of jurisdiction abridges the plaintiffs' and appellants' right to freedom from unreasonable searches and seizures in violation of the Fourth Amendment to the Constitution of the United States.

2. The judgment of the District Court dismissing

the complaint for want of jurisdiction is erroneous in that said District Court had jurisdiction over the persons of the defendants and the subject matter of the complaint.

LORRIN ANDREWS and
A. L. WIRIN
By A. L. WIRIN
Attorneys for Plaintiffs

Received copy of the within this 28 day of April, 1944.

CHARLES H. CARR HKM
U. S. Atty.
Attorney for Defendants

[Endorsed]: Filed May 3, 1944. [126]

[Title of District Court and Cause.]

PRAECIPE AND INSTRUCTIONS TO CLERK RE PREPARATION OF RECORD

To the Clerk of the Above Entitled Court:

You will please prepare a transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, under the appeal heretofore taken herein, and include in said transcript the following pleadings, proceedings, orders and documents, to wit:

1. Complaint, filed April 7, 1943.

2. Motion to dismiss, by defendant Theodore Cruise, filed June 8, 1943.

3. Amended motion to dismiss of defendant Theodore Cruise, filed August 28, 1943.

4. Affidavit of R. B. Hood, filed August 28, 1943.

5. Motions to dismiss of defendants R. B. Hood, John Roche, Robert T. Pugh, Edward A. Furbush, Earl P. Staten, and Howard H. Davis, filed August 28, 1943. [127]

6. Affidavit of R. B. Hood, filed August 28, 1943.

7. Notice of motion and motion to dismiss of defendants Robert M. Montgomery, Carl B. Sherman, and Dennis G. Smith, filed November 18, 1943.

8. Notice of motion and motion for summary judgment, filed. November 18, 1943.

9. The following affidavits, filed on December 3, 1943: George M. Langdon, Augustus F. Scheimerhorn, John C. Norris, Louis D. Wine, Carl B. Sherman, Dennis G. Smith, H. Frank Angell, Richard C. Thompson, Robert T. Pugh, Adam E. Wolf, Earl P. Staten, and Howard H. Davis.

10. The following counter affidavits, filed December 29, 1943: A. Ray Elsea, Marin J. Elsea, M. Elizabeth Gloeckler, Jacob Gloeckler, Pauline L. Kelso, Max Theodore Miller, Virginia S. Miller, Bay Burns Sharp, Homer G. Wilcox, and Shanna T. Jakeman.

11. Copies of all minutes, orders, and entries.

12. Bond on appeal.

13. Transcript of proceedings. March 20, 1944 (oral opinion of Judge Ralph E. Jenney).

14. This Praecipe.

LORRIN ANDREWS and
A. L. WIRIN
By A. L. WIRIN
Attorneys for Plaintiffs

Received copy of the within this 28 day of April, 1944.

CHARLES H. CARR HKM
U. S. Atty.
Attorney for Defendants

[Endorsed]: Filed May 3, 1944. [128]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 128 inclusive contain full, true and correct copies of: Complaint for Damages for False Imprisonment and Unlawful Search and Seizure; Notice of Motion of Theodore Cruise to Dismiss; Motion of Theodore Cruise to Dismiss; Amended Motion of Theodore Cruise to Dismiss; Affidavit of R. B. Hood; Notice of Motion of R. B. Hood et al to Dismiss; Affidavit of R. B. Hood; Notice of Motion and Motion of Robert M. Montgomery to Dismiss; Notice of Motion and Motion of R. B. Hood et al for Summary Judgment; Affidavits of George M. Langdon, Augustus F. Schermerhorn; John C. Norris; Louis D. Wine, Carl B. Sherman, Dennie G. Smith, H. Frank Angell, Richard C. Thompson, Robert T. Pugh, Adam E. Wolf, Earl P. Staten, and Howard H. Davis; Counter-Affidavits of A. Ray Elsea, Marion J. Elsea, Elizabeth Gloeckler, Jacob Gloeckler, Pauline

L. Kelso, Max Theodore Miller, Virginia S. Miller, Bay Burns Sharp, Homer G. Wilcox and Shanna T. Jakeman; Minute Orders Entered January 17, 1944 and March 20, 1944 respectively; Judgment; Notice of Appeal; Undertaking for Costs on Appeal; Plaintiffs' and Appellants' Statement of Points to be Relied Upon on Appeal and Praecipe and Instructions to Clerk re Preparation of Record which, together with Reporter's Transcript of Oral Decision of the Court transmitted herewith, constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $52.10 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 29 day of May, 1944.

[Seal] EDMUND L. SMITH,
Clerk
By THEODORE HOCKE
Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
March 20, 1944

Appearances:

For the Plaintiffs:

Charles H. Carr, Esq., United States Attorney; by
Mildred L. Kluckhohn, Assistant United States Attorney.

For the Defendants:

Lorrin Andrews, Esq., 709 Fay Building, Los Angeles, California. [1*]

Los Angeles, California,
Monday, March 20, 1944.
10:30 A.M.

The Court: In the matter of Bell vs. Hood, No. 2850, and Elliott vs. Manion, No. 2796, are the plaintiffs ready?

Mr. Andrews: I am here in the case of Bell, your Honor. In the Manion case, Mr. Wirin asked me to apologize to your Honor. He was called to the State of Washington, and will be back tomorrow morning. It is difficult to get around nowadays.

The Court: Very well. You appear, Miss Kluckhohn, for the defendants in each case?

Miss Kluckhohn: Yes.

The Court: For the benefit of counsel, I shall

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

take up the matter of Bell vs. Hood first. I shall go into my reasons in this matter in some detail. Although much of it might be considered to be dictum in this particular case, it will show counsel my views for their future guidance. As it is not going to be a published opinion, I haven't any objection to doing it informally, for the benefit of counsel.

This is an action for damages for false imprisonment and unlawful search and seizure.

The matters now before the Court are the motions to dismiss of (1) Theodore Cruise, (2) R. B. Hood, John Roche, Robert T. Pugh, Edward A. Furbush, Earl P. Staten and Howard [2] H. Davis, and (3) Robert M. Montgomery, Carl B. Sherman and Dennis G. Smith.

There is also a Motion for Summary Judgment in favor of all the defendants except Theodore Cruise.

The motion to dismiss is made upon the ground that the complaint fails to state a claim against the defendants upon which relief can be granted, for the following reasons:

1. Duly appointed and authorized officers and agents of the United States Government are immune from civil process for damages for acts done within the scope of their authority.

2. The searches and seizures were made incidental to and contemporaneously with lawful arrests and were valid, abridging no rights under the Constitution of the United States.

Plaintiffs contend that the defendant F.B.I.

agents (one defendant, Merle Armstrong, who has not appeared, is alleged to be on the police force in the City of Los Angeles) were acting beyond the scope of their authority; that they had no search warrants; that, in most instances, the arrests of the plaintiffs were made without warrants of arrest and the warrants of arrest were not shown to plaintiffs herein when that was requested; that the searches and seizures were not incidental to arrests, but were exploratory and general and made solely to find evidence of plaintiffs' guilt of some crime; and that the defendants did not cause the plaintiffs to be brought before a committing officer [3] immediately, or within a reasonable time after the arrest.

The complaint alleges, among other things, that on December 17, 1942, the individual plaintiffs herein were indicted by the Grand Jury for this district, charged with a violation of Section 34, Title 50, United States Code.

Paragraph IX of this complaint alleges:

> "That on or about the 17th day of December, 1942, defendant R. B. Hood and each of the other defendants, unlawfully conspired with each other to act beyond their authority as said Federal Bureau of Investigation agents and police officer respectively, and agreed that they would abridge the Constitutional rights of the plaintiffs as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States to be free from the deprivation of liberty and property without due process of

law, and to be free from unreasonable searches and seizures, and agreed unlawfully to simultaneously, in the early morning of December 18th, 1942, search the homes of the individual plaintiffs herein without any warrants of search or seizure, and unlawfully to seize the papers, documents and effects of said plaintiffs and of 'Mankind United', and falsely to imprison the individual plaintiffs by unlawfully arresting some of the individual plaintiffs without a warrant of arrest and unreasonably [4] to delay the taking of all of the individual plaintiffs before a committing officer, in order to effectuate the unlawful searches and seizures aforesaid."

Paragraph X alleges that on December 18, 1942, the defendants and each of them, in order to carry out the terms and conditions of the illegal conspiracy, and solely therefor, arrested and imprisoned the individual plaintiffs and searched their homes and seized and carried away their books, papers and effects and those of "Mankind United."

The allegations of Paragraph XI amplify and make more specific the general allegations of Paragraph X.

The balance of the complaint alleges that the plaintiffs have been residents of California for many years; that there was no likelihood of their leaving California, as the defendants well knew; *the* the defendants had no search warrants; that, in the instances in which the arrests were made without warrants of arrest, the defendant had no

reasonable ground to believe that the plaintiff so arrested was guilty of a felony; that there was no likelihood that the plaintiffs would escape before a warrant of arrest could be obtained; that the plaintiffs were not taken immediately before a committing officer; that plaintiff "Mankind United" has been damaged $100,000.00; that plaintiff Bell has been damaged $155,000.00; and that the eleven other plaintiffs have each been damaged $75,000.00; [5] making a total of damages asked of $1,000,000.00.

The question of jurisdiction has not been raised, but this Court has the power, under Section 80 of 28 USCA, to institute an inquiry to determine that question. McNutt v. General Motors, etc. Corp., 298 U. S. 178, 182, 189; Robinson v. Anderson (Cal.) 121 U. S. 522. See also Judge Yankwich's decision in Allen v. Clark, 22 Fed. Supp. 898, at 900.

The jurisdiction of this court is alleged in Paragraph I of the complaint as follows:

> "Jurisdiction of this Court is founded upon a Federal question arising under the Fourth and Fifth Amendments to the Constitution of the United States; and Title 5, U. S. Code; Sections 300 and 300a, as more fully appears hereinafter. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00). Jurisdiction of this Court is founded upon the Federal question involving the rights of the individual plaintiffs and each of them to be free from deprivation of liberty without due pro-

cess of law by false and unlawful imprisonment; and the Constitutional rights of all the plaintiffs to be free from unreasonable searches and seizures. All of the persons who participated in the acts to be hereinafter complained of, with the exception of the defendant [6] Merle Armstrong, were at the time of the commission of said acts, and at all times herein have been, officers of the Federal Government, to-wit, Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice, and claim to have acted under and by virtue of the provisions of Sections 300 and 300a of Title 5, U. S. Code aforesaid, and have acted in concert as is more particularly set forth hereinafter."

Where an illegal search has been made by federal officers in violation of the rights of the plaintiff under the fourth and Fifth Amendments, no action will lie in the federal court unless there is a diversity of citizenship between the parties or the circumstances are such that a federal court would have otherwise had jurisdiction, in other cases between such parties. The fact that a right of action arises under the Constitution of the United States because of the violation of a constitutional right, does not involve a controversy of such a nature as to give jurisdiction to the federal court under its judicial code, 28 USCA 41. Cornelius on Search and Seizure, 2nd Ed., Section 491, page 958. Taylor v. DeHart, District Court of Missouri, 1926, 22 Fed. (2d) 206 (action against prohibition agents for

damages for unlawful search), dismissed for want of jurisdiction, 274 U. S. 726; Dowling Bros. vs. Andrews, 7th Circuit, July 22, 1927, 19 Fed. (2nd) 961 (action to [7] recover value of whiskey alleged to have been lost to plaintiff by the acts of defendant, while he was acting as National Prohibition Director); Viles v. Symes, 10th Circuit, 129 Fed. (2d) 828, certiorari denied 318 U. S. 653 (action against a federal District Judge and others for damages for allegedly malicious prosecution and false imprisonment)

The action is dismissed under 28 USCA, Section 80.

I am, as I say, giving what might be considered as dictum in this particular case here, for the guidance of counsel.

The Fourth Amendment to the United States Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The provisions for arrest are found in Sections 591 and 595 of 18 USCA, and the pertinent portions are:

> "Sec. 591. For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by

any United States commissioner, * * * and agreeably to the usual mode of process against offenders in such [8] state (where offender may be found), * * * be arrested and imprisoned, or bailed, * * * for trial before such court of the United States as by law has cognizance of the offense. * * *"

"Sec. 595. It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States Commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial. * * *"

Sections 300 and 300a of Title 5, USCA, provide as follows:

"Section 300. Officials for detection and prosecution of crimes. For the detection and prosecution of crimes against the United States, and for the acquisition, collection, classification, and preservation of criminal identification records and their exchange with the officials of states, cities, and other institutions, the Attorney General is authorized to appoint officials who shall be vested with the authority necessary for the execution of such duties."

"Section 300a. Federal Bureau of Investigation; authority of officers to serve warrants and make [9] arrests, authority to carry arms. The Director, Assistant Directors, agents, and inspectors of The Federal Bureau of Investiga-

tion of the Department of Justice are empowered to serve warrants and subpoenas issued under the authority of the United States; to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer. Such members of the Federal Bureau of Investigation of the Department of Justice are authorized and empowered to carry firearms."

Sections 841 and 842 of the Penal Code of the State of California provide as follows:

"Sec. 841. The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission [10] of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape."

"Sec. 842. If the person making the arrest is acting under the authority of a warrant, he must show the warrant, if required."

When a public officer acts outside the scope of his authority or acts in a wanton, malicious and unlawful manner and, in either event, injures a private citizen, he is liable in an action for damages. Cooper v. J. F. T. O'Connor, et alia, C.A. D.C., 1938, 99 Fed. (2d) 135, 137, certiorari denied, 305 U. S. 643.

On the contrary, if the act complained of was done within the scope of the officer's duties as defined by law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment of discretion, or because of an erroneous construction and appliction of the law. This rule of immunity was first applied and has been most universally observed in the case of judges. Bradley v. Fisher, 13 Wall. (80 U. S.) 335, 351-352; Alzua v. Johnson, 231 U. S. 106, 111; Cooper v. O'Connor, supra, and other cases therein cited. It has also been applied to cabinet officers. Spalding v. Vilas (Postmaster General), 161 U. S. 483, 498; Glass v. Ickes, Secretary of the Interior, 117 Fed. (2d) 273, certiorari denied 311 U. S. 718. In the cases which have [11] extended the privilege to administrative officers without policy-determining functions, the thing held to be privileged has usually, if not always, been an act in the general line of duty. Thus it has been held that a Special Assistant to the Attorney General cannot be sued for an improper indictment and trial (Yaseli v. Goff, 2nd Circuit, 12 Fed. (2d) 396, affirmed 275 U. S. 503, on au-

thority of Bradley v. Fisher and Alzua v. Johnson, supra); or a penintentiary warden for an improper imprisonment under color of law (where parole board had revoked probation) (Long v. Wood, App. D. C., 92 Fed. (2d) 211); or a United States consul (U. S., to Use of Parravicino v. Brunswick, App. D. C., 69 Fed. (2d) 383), or a division chief in the War Department (DeArnaud v. Ainsworth, 24 App. D. C. 167, appeal dismissed, 199 U. S. 616) for libel in an official report; or a Special Agent of the Bureau of Investigation, or other officers, for making charges before a grand jury along the lines of their respective functions (Cooper v. O'Connor, supra).

Then there is a general rule that a ministerial officer who acts wrongfully, although in good faith, is nevertheless liable in a civil action and cannot claim the immunity of the sovereign. There is also a general rule that if any officer—ministerial or otherwise—acts outside the scope of his jurisdiction and without authorization of law, he is liable in an action for damages for injuries suffered by a citizen as a result thereof. (See cases cited in [12] Cooper v. O'Connor, supra.)

From the foregoing it is clear that the privilege of immunity cannot be applied to the F.B.I. agents in preforming the ministerial duties which they are authorized to perform under Section 300a of Title 5 of USCA. Neither can the privilege of immunity contravene the Fourth Amendment of the Constitution. While the complaint does not allege that R. B. Hood made any of the arrests or searches

and seizures, it does allege that he and the other defendants conspired to act beyond their authority to make the arrests and searches and seizures alleged.

As to whether the arrests were lawful and the searches and seizures were made incidental thereto are all questions of fact. Whether the arresting officers had reasonable grounds to believe the persons arrested were guilty of the commission of a felony are questions of fact, for it could not be claimed that the officers saw conspiracy being committed (Go-Bart v. U. S., 282 U. S. 344, 357). Whether there was a likelihood of the persons escaping before warrants could be obtained for their arrests is a question of fact. Whether the securing of search warrants was reasonably practicable is a question of fact. See Carroll v. U. S., 267 U. S. 132, 156; Walker v. U. S., 5th Circuit, 125 Fed. (2d) 395. Whether the detention of the plaintiffs was reasonable or amounted to false imprisonment is a question of fact. If the searches and seizures were incidental to the arrests, [13] whether they were reasonable or were exploratory are questions of fact. Whether the plaintiffs were held incommunicado is a question of fact. Each case has to be decided on its own facts and circumstances in determining reasonableness. Go-Bart Importing Company v. U. S., 282 U. S. 344, 357; Papani v. U. S., 9th Circuit, 84 Fed. (2) 160, 161.

In the government's reply memorandum on the motion to dismiss it is contended that at least some

of the questions of fact raised are res judicata because of Judge Yankwich's decision on the motions to suppress evidence and to return articles seized in the case of U. S. v. Bell, No. 15759. See the opinion in that case, 48 Fed. Supp. 986.

By omission under Rule 12 (b) of the Federal Rules of Civil Procedure and inclusion under Rule 8 (c) thereof, the defense of res judicata may not be raised by a motion to dismiss (unless the facts clearly appear from the complaint) but must be set forth in the Answer. Eberle v. Sinclair Prairie Oil Co., District Court of Oklahoma, 3 Federal Rules Service, page 111, 35 Fed. Supp. 296, affirmed 120 Fed. (2d) 746 (10th Circuit); Consolidated Freightways, Inc. v. Railroad Commission of California, 4 Federal Rules Service, page 87, 36 Fed. Supp. 269 (a three-judge case, with Judges Wilbur, St. Sure and Roche sitting); Jones v. Miller, Western District of Pennsylvania, 6 Federal Rules Service, page 110.

It probably will not be necessary to say anything about permitting amendment in this case. I have attempted [14] to inform counsel of my views on the matter.

Rule 15 (a) of the FRCP provides:

> "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served * * *."

In United States v. Newbury Mfg. Co., 1st Circuit, November 21, 1941, 5 Federal Rules Service, 15a, 24, page 235, 123 Fed. (2d) 453, the court said (at page 236):

"Apparently a motion to dismiss is not a 'responsive pleading' within the meaning of the rule (referring to Rule 15 (a). Cf. Rules 7a and 12b. Therefore, by a literal reading of Rule 15a it might be argued that a plaintiff would be entitled as of right to one amendment of his complaint, without any limit of time, despite the filing of a motion to dismiss. However, it could hardly have been intended that a plaintiff should have the right to amend without limit of time after a judgment of dismissal had been entered; nor could it have been intended that the trial court should have discretionary power for an unlimited time after such judgment of dismissal to vacate the judgment and allow an amendment of the complaint. Such a construction of Rule 15a would be out of harmony with Rule 59b which narrowly limits the period within which a motion for new trial can be made after the entry of [15] judgment."

Rule 7(a) of the Federal Rules of Civil Procedure provides:

"There shall be a complaint and an answer; and there shall be a reply, if the answer contains a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be

allowed, except that the court may order a reply to an answer or a third-party answer."

Rule 12 (b) of the Federal Rules of Civil Procedure provides:

"Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * *"

The action is dismissed.

[Endorsed]: Filed May 29, 1944. [16]

[Endorsed]: No. 10790. United States Circuit Court of Appeals for the Ninth Circuit. Arthur L. Bell, individually, and as an Associate of and Division Superintendent of "Mankind United", a Voluntary Association, for and in behalf of said "Mankind United" and The Associates thereof; Maude Askew, Eugene Wadsworth Brown, J. Fred Burkey, Lawrence Cook, A. Ray Elsea, Jacob Gloeckler, Bay Burns Sharp, Shanna Jakeman, Pauline Kelso, Max Theodore Miller and Homer G. Wilcox, Appellants, vs. R. B. Hood, Theodore Cruise, Philip Bowser, George M. Langdon, William Gieson, Eugene Greer, J. H. Angell, J. Secrist, John Roche, Malcom C. Powrie, Cecil C. Humphreys, A. F. Scheimerhorn, William Branigan, John Doe Wolfe, Don C. Swanson, Carl B. Sherman, Earl K. Adams, Howard H. Davis, Robert T. Pugh, Edward A. Furbush, O. Wilson Farrell, Dennis G. Smith, Herbert J. Nubish, Robert O'Keefe, Earl P. Staten, Robert Montgomery, Newell Williams, Richard Doe Devine, Richard Doe Bullfrass, John C. Norris, Walt Butler, Mike Cassidy, Paul J. O'Farrell, John W. Schaller, Louis D. Wine, Merle Armstrong, John Philip Manton and Francis John Good, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed June 5, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10790

ARTHUR L. BELL, et al,

Appellants,

vs.

R. B. HOOD, et al.

Appellees.

APPELLANTS' STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

The appellants hereby designate the following points and grounds of appeal:

1. The judgment of the District Court dismissing the complaint for want of jurisdiction abridges the appellants' right to freedom from unreasonable searches and seizures in violation of the Fourth Amendment to the Constitution of the United States.

2. The judgment of the District Court dismissing the complaint for want of jurisdiction is erroneous in that said District Court had jurisdiction over the persons of the appellees and the subject matter of the complaint.

LORRIN ANDREWS
A. L. WIRIN
By A. L. WIRIN
Attorneys for Appellants

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD FOR PRINTING

The appellants designate for printing the entire record as certified to this Court by the Clerk of the District Court.

LORRIN ANDREWS
A. L. WIRIN
By A. L. WIRIN
Attorneys for Appellants

(Affidavit of Service by Mail.)

[Endorsed]: Filed June 5, 1944. Paul P. O'Brien, Clerk.

No. 10790

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARTHUR L. BELL, individually and as an Associate of and Division Superintendent of "Mankind United", a Voluntary Association, for and in behalf of said "Mankind United" and The Associates thereof; Maude Askew, Eugene Wadsworth Brown, J. Fred Burkey, Lawrence Cook, A. Ray Elsea, Jacob Gloeckler, Bay Burns Sharp, Shanna Jakeman, Pauline Kelso, Max Theodore Miller and Homer G. Wilcox,

Appellants,

vs.

R. B. HOOD, THEODORE CRUISE, PHILIP BOWSER, GEORGE M. LANGDON, WILLIAM GIESON, EUGENE GREER, J. H. ANGELL, J. SECRIST, JOHN ROCHE, MALCOM C. POWRIE, CECIL C. HUMPHREYS, A. F. SCHEIMERHORN, WILLIAM BRANIGAN, JOHN DOE WOLFE, DON C. SWANSON, CARL B. SHERMAN, EARL K. ADAMS, HOWARD H. DAVIS, ROBERT T. PUGH, EDWARD A. FURBUSH, O. WILSON FARRELL, DENNIS G. SMITH, HERBERT J. NUBLISH, ROBERT O'KEEFE, EARL P. STATEN, ROBERT MONTGOMERY, NEWELL WILLIAMS, RICHARD DOE DEVINE, RICHARD DOE BULLFRASS, JOHN C. NORRIS, WALT BUTLER, MIKE CASSIDY, PAUL J. O'FARRELL, JOHN W. SCHALLER, LOUIS D. WINE, MERLE ARMSTRONG, JOHN PHILIP MANTON and FRANCIS JOHN GOOD,

Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, March 22, 1945.

Before: Mathews, Stephens and Bone,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. A. L. Wirin, counsel for appellants, and by Mr. Ronald Walker, Assistant United States Attorney, counsel for appellees, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, April 30, 1945.

Before: Mathews and Bone,
Circuit Judges.

[Title of Cause.]

ORDER SUBMITTING MOTION TO REVERSE JUDGMENT OF DISTRICT COURT AND REMAND CAUSE, ETC.

Ordered motion of appellants to reverse judgment of the District Court and remand cause to grant leave to appellants to file amended complaint argued by Mr. A. L. Wirin, counsel for appellants, in support of such motion, and by Mr. Ronald Walker, Assistant United States Attorney, counsel for appellees, and submitted, on oral stipulation of said counsel, to Mathews, Stephens and Bone, Circuit Judges, for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, June 7, 1945.

Before: Mathews, Stephens and Bone,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

By direction of the Court, Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Before: Mathews, Stephens and Bone,
Circuit Judges.

Stephens, Circuit Judge.

OPINION

The district court ruled that it was without criminal jurisdiction of the subject matter and dismissed the complaint. Plaintiffs below appeal. For

convenience we shall refer to appellees as defendants.

The complaint filed in the district court sounds in tort; the damages prayed for far exceed the jurisdiction requirement as to value in controversy; there is no diversity of citizenship. It follows that the district court was right unless original jurisdiction of the case is conferred by § 41, Title 28 U.S.C.A. (§ 24 of the Judicial Code), as amended, the applicable part of which reads: "The district court shall have original jurisdiction as follows: (1) * * * [when the case] (a) arises under the Constitution or laws of the United States. * * *."

Appellants contend that their right of action arises under the Fourth and Fifth Amendments to the federal Constitution, which we quote in the margin.[1]

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[1] The Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private

It is set out in the complaint that defendants, through the medium of unlawful and unreasonable searches and seizures, have violated the Fourth Amendment to the personal injury of the several plaintiffs and that such defendants have invaded plaintiffs' immunities as provided by the Fifth Amendment to the effect that no person "* * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *." It is therefore alleged and argued by the plaintiffs that they have a right to recover personal judgments in the federal district court against the defendants involved for injuries sustained.

It is alleged in the complaint that Arthur L. Bell, one of the plaintiffs and appellants, is an "Associate of and Division Superintendent of Mankind United, a Voluntary Association," and brings the action in behalf of the organization and of the Associates thereof. Whether or not Bell can legally, or whether or not he has the right or power to, maintain the action on behalf of such persons or on behalf of such association, we do not consider.

The defendants are not sued in the capacity of officers but it is alleged in the complaint that they were, with one exception, Federal Bureau of Investigation officers.

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property be taken for public use, without just compensation."

For an historical account of search and seizure and Fourth and Fifth Amendments see Boyd v. United States, 116 U.S. 616 (1886).

It appears that one Merle Armstrong, one of the defendants below, is a Los Angeles policeman and that he was not an acting federal officer at any of the time or during any of the events with which this action is concerned. Counsel stated in the oral argument in this court that they do not press any of their points as to Armstrong, and we shall therefore proceed in our reasoning without regard to him.

At the time of the alleged invasion of plaintiffs' rights each plaintiff stood indicted as of December 18, 1942, by a federal grand jury of violating § 34, Title 50 U.S.C.A. No trial had been held.

It is alleged that the defendants, on the day the indictment was returned, "unlawfully conspired with each other to act beyond their authority as said Federal Bureau of Investigation agents and police officer respectively, and agreed that they would abridge the Constitutional rights of the plaintiffs as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States to be free from the deprivation of liberty and property without due process of law, and to be free from unreasonable searches and seizures, and agreed, unlawfully to simultaneously, in the early morning of December 18th, 1942, search the homes of the individual plaintiffs herein without any warrants of search or seizure, and unlawfully to seize the papers, documents and effects of said plaintiffs and of 'Mankind United', and falsely to imprison the individual plaintiffs by unlawfully arresting some of the individual plaintiffs without a warrant

of arrest and unreasonably to delay the taking of all of the individual plaintiffs before a committing officer, in order to effectuate the unlawful searches and seizures aforesaid.

"That thereafter, and on the 18th day of December, 1942, as will appear more particularly hereinafter, the defendants and each of them, in order to carry out the terms and conditions of the illegal conspiracy aforesaid, and solely for the purpose of carrying out said terms and conditions, did arrest and imprison the individual plaintiffs herein, and did search the homes of said plaintiffs, and seize and carry away books, papers and effects of said individual plaintiffs and of said 'Mankind United.'"

It is alleged that as to plaintiff Bell the following occurred. Defendants Cruise, Bowser, Lamdon, Gleson, Greer, and two named fictitiously broke doors of his residence, entered, and arrested Bell. The defendants had no search warrant or warrant of arrest. They searched the entire premises leaving them in confusion and disorder. They took Bell and held him for several hours away from the premises and did not take him before a magistrate. They took thousands of documents, papers, and records belonging to "Mankind United", which were entrusted to Bell and took $8,500.00 in money. They took property belonging to Bell and his wife including safe deposit boxes. During a considerable period Bell was held incommunicado and not allowed to see his attorney who was just outside the door, and he was questioned. The allegations are to

the effect that at about the same time all the other plaintiffs were subjected to substantially the same illegal treatment, though in detail varying, by one or more of the defendants.

It is apparent that each plaintiff personally seeks compensatory damages for alleged illegal arrest, false imprisonment, the forceable removal of his person from one place to another, the searching of his premises illegally and unreasonably, the seizing of property belonging to him and others, and the questioning without affording him the aid of advice of an attorney.

There can be no question but that the complaint states strong cases, and if the allegations have any foundation in truth, the plaintiffs' legal rights have been ruthlessly violated. The question of whether or not actions for the recovery of personal judgments for damages against the defendants individually can be maintained in federal court under the allegations hereinbefore briefly set out was directly before the trial court, and it very properly noticed the question sua sponte, and answered it in the negative.

It will be helpful at this juncture briefly to comment upon the genesis of the Fourth and Fifth constitutional Amendments.[2] The theory of our federal Constitution is that each state is sovereign with absolute sovereign powers unlimited except by those powers which have been granted to the federal gov-

[2] For statement that these amendments are limitations upon government action and no more, see Burdeau v. McDowell, 256 U. S. 465, 472, 475 (1921).

ernment. No right or any power to curtail any right mentioned in either the Fourth or Fifth Amendments was ever surrendered or was ever granted to the United States Government by the states or by the people. However, fearing that the exercise of the power actually granted to the central government of the union might tend to whittle away the civil rights of the people, the people affirmatively asserted some of such rights in the text of the national charter itself. In stating them, the people did so by directly denying to the federal government the power to infringe upon such rights.

Nowhere in this case is there a suggestion that anyone questions the existence of or a complete understanding of these rights. (We use the word "rights" throughout this opinion as including immunities mentioned in the constitutional articles here under consideration.) The allegations of the complaint are that the defendants conspired to do what they recognized as beyond their authority. Therefore, there is no question of construction concerning any constitutional or other United States law.

Chief Justice Marshall declared in Cohens v. Virginia, 19 U.S. 264, 378 (1821): "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or law of the United States, whenever its correct decision depends on the construction of either." In Osborn v. Bank of the United States, 22 U.S. 737, 821 (1824), he commented: "If it be a sufficient foundation for juris-

diction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction."

The trial court thought Taylor v. DeHart, 22 Fed. 2d 206 (DC Mo., 1926), which presents essentially the same question as here, was correctly decided. Cornelius in his work on Search and Seizure (2d ed.), p. 958, § 491, states the rule as follows: "Where an illegal search has been made by federal officers in violation of the rights of the plaintiff under the Fourth and Fifth Amendments, no action will lie in the federal court unless there is a diversity of citizenship between the parties or the circumstances are such that a federal court would have otherwise had jurisdiction, in other actions between such parties. The fact that a right of action arises under the Constitution of the United States because of the violation of a constitutional right, does not involve a controversy of such a nature as to give jurisdiction to the federal court under its judicial code, Section 24." See Dobie, "Federal Jurisdiction and Procedure" (1928), p. 164, § 69.

The Supreme Court in Gully v. First National Bank, 299 U.S. 109 (1936), treats the question as to when a cause arises under the Constitution or laws of the United States, and the opinion (by Mr. Justice Cardozo) is consistent with the quotation from Cornelius, supra. See Marshall v. Desert Properties

Co., 103 Fed. 2d 551, 552 (CCA 9, 1939); Viles v. Symes, 129 Fed. 2d 828 (CCA 10, 1942). We comment on the Gully case in the margin.[3] The recent

[3] In Chaskin v. Thompson, 143 Fed. 2d 566, 569 (CCA 9, 1944), appears the following paragraph: "In Gully v. First National Bank, 299 U.S. 109, the court was considering a case which was begun in state court and removed to federal court upon motion of respondent (defendant) upon the ground that it arose under the Constitution or laws of the United States (Jud. Code § 28, 28 U.S.C.A. § 71 Cf. Jud. Code § 24(1)(a), 28 U.S.C.A. § 41). The motion was granted, and federal trial court subsequently denied remand. The action was for unpaid state taxes on national bank shares. The circuit court of appeals sustained the federal jurisdiction. 299 U.S. at page 112, 'upon the ground that the power [of the state] to lay a tax upon the shares of national banks has its origin and measure in the provisions of a federal statute [citation], and that by necessary implication a plaintiff counts upon the statute in suing for the tax.' The Supreme Court then discusses the question 'how and when a case arises "under the Constitution or laws of the United States"' and, referring directly to the case before it, says, 299 U.S. at page 115, 'The obligation of the contract [the tax levy] being a creation of the state, the question remains whether the plaintiff counts upon a federal right in support of his claim that the contract has been broken. The performance owing by the defendant was payment of the valid debts, and taxes are not valid debts unless lawfully imposed. From this defendant argues that a federal controversy exists, the tax being laid upon a national bank or upon the shareholders, therein, and for that reason being void unless permitted by the federal law. * * * That there is a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid.' And again on page 117 of

case of Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 213 (1944), is not, as appellants argue, favorable to their views. The court therein plainly states, as the basis for holding the case properly laid in federal court, that it concerns "commerce." In the words of the court, "The case is therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction by 28 U.S.C. §41(8), Judicial Code, § 24 (8)."

It will be noticed that Congress has enacted no law under the authority of the constitutional provision relied upon by plaintiffs as the jurisdictional basis giving United States Courts jurisdiction over torts in general. It has enacted laws granting such jurisdiction as to public officials who have given official bonds and in certain other instances as in the case of Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, supra.

It appears by the allegations in the complaint that the defendants, with the single exception of Armstrong, are federal peace officers, but that they

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299 U.S., the court says: "* * * The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states."

Inconsistent reasoning will be encountered in the cases, and the student of the question should not allow cases concerning illegally procured evidence to confuse his study.

conspired to go beyond the scope of their authority as such. It would seem that an effort was made to distinguish the action as one against the defendants in their individual capacity and not as officers. There might be cases in which this distinction is important, but we think it is of no importance in the instant case.

Appellants allege that appellees base their actions upon §§ 300-302, Title 5 U.S.C.A. But this allegation avails them nothing as jurisdiction is not affected by allegations of probable defenses. Gully v. First National Bank, supra.

We are of the opinion and so hold that the trial court did not err in holding that the action does not arise under the Constitution or laws of the United States in the sense the Congress used that expression in § 41 of Title 28 U.S.C.A. (§ 24 Jud. Code) and that it did not err in dismissing the complaint.[1]

Appellants' motion to remand submitted April 30, 1945, is denied.

Affirmed.

[Endorsed]: Opinion. Filed June 7, 1945. Paul P. O'Brien, Clerk.

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[1] Interesting upon the general subject of Federal court jurisdiction in Civil Rights cases are the following: Civil Rights Cases, 109 U.S. 3; Nashville v. Browning, 310 U.S. 362-369; Gould v. United States, 255 U.S. 298; Ex Parte Royall, 117 U.S. 241-251; United States v. Classic, 313 U.S. 299; Screws v. United States, U.S. , decided May 7, 1945.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10790

ARTHUR L. BELL, etc., et al.,

Appellants,

vs.

R. B. HOOD, et al.,

Appellees.

JUDGMENT

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and upon motion of appellant to remand cause and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the motion to remand be, and hereby is denied and that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellees and against the appellants.

It Is Further Ordered and Adjudged by this Court that the appellees recover against the appellants for their costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered June 7, 1915. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred seventy-nine (179) pages, numbered from and including 1 to and including 179, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 25th day of June, 1945.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fols. 181-184]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

NOTICE OF MOTION TO REVERSE JUDGMENT, WITH INSTRUCTIONS FROM THIS COURT TO THE DISTRICT COURT TO GRANT LEAVE TO THE APPELLANTS TO FILE AMENDED COMPLAINT.

To Charles H. Carr, United States Attorney, and Ronald Walker, Assistant United States Attorney, Attorneys for Appellees:

You and each of you will please take notice that the appellants will move the court for an order reversing the judgment of the District Court, and instructing said District Court to grant leave to appellants to file an amended complaint, in the court room of said Court, in the Post Office and Federal Building at San Francisco, California [fol. 185] on the 30th day of April, 1945, at 10 A. M., or as soon thereafter as counsel may be heard.

The appellants will rely upon the files and records of the clerk of this court in the above-entitled appeal, upon the attched Memorandum of Points and Authorities, and upon the Proposed Amended Complaint For Damages For False Imprisonment And Unlawful Search And Seizure by Federal Officers.

Lorrin Andrews, A. L. Wirin, by A. L. Wirin, Attorneys for Appellants.

[fol. 186] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

MOTION

The appellants move the court for an order reversing the judgment of the District Court for the Southern District of California in the above-entitled matter with instruc-

tions to said District Court to grant the appellants leave of court to file an Amended Complaint.

Lorrin Andrews, A. L. Wirin, by A. L. Wirin, Attorneys for Appellants.

[fol. 187] In the United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted]

Memorandum of Points and Authorities in Support of Motion to Reverse Judgment

Preliminary Statement

There has been lodged with the clerk of this Court an original verified "Proposed Amended Complaint for Damages for False Imprisonment and Unlawful Search and Seizure by Federal Officers." For the convenience of the judges of the court, its text has been printed and appears as Appendix "A," *infra*.

The Proposed Amended Complaint is substantially identical to the original Complaint herein [R. 2-30], in so far as the recital of facts in it is concerned, particularly with respect to the facts of the searches and seizures, and the detention of the plaintiffs. [Paragraph XI of the original Complaint, R. 10; Paragraph VIII of Proposed Amended Complaint, p. 17, *infra*.]

[fol. 188] Omitted from the Proposed Amended Complaint have been all recitals of conspiracy appearing in the original complaint.

Paragraph I of the original complaint [R. 3], has been redrafted so that the jurisdictional recitals in the Proposed Amended Complaint are more specific and detailed. [Cf. Paragraph I of Complaint, R. 3, with Paragraph I of Proposed Amended Complaint, *infra*, p. 12.]

Omitted, too, from the Proposed Amended Complaint, as a party defendant, is Merle Armstrong, a city police officer, so that all of the defendants in the Amended Complaint, as proposed, are Federal Officers, to wit: special agents of the Federal Bureau of Investigation.

The allegations of the Complaint are summarized in our opening brief, pp. 4-8, and are not repeated here. They

are also accurately outlined by the District Court below, in its oral opinion [R. 147-51].

I

The Proposed Amended Complaint Discloses That the United States District Court Has Jurisdiction in the Premises.

More particularly, the "Proposed Amended Complaint" shows in that it is a suit of a civil nature arising under the Constitution and the laws of the United States, in the following respects:

The construction or effect of the following constitutional and statutory provisions is in issue:

A. Constitutional Provisions

1. Whether or not the searches and seizures by the defendants were unreasonable, in violation of the 4th Amendment.

[fol. 189] 2. Whether or not the imprisonment of the plaintiffs by the defendants deprived the plaintiffs of liberty without due process of law, in violation of the 5th Amendment.

B. Statutory Provisions

1. Whether or not either, or both, the searches and seizures by the defendants, and the imprisonment of the plaintiffs by the defendants, violated the rights of the plaintiffs conferred upon them by Title 5, U. S. Code, Sections 300 and 300a, by violating the limitations of power imposed upon said defendants by said laws.

It may be said that under Sections 300 and 300a of Title 5, U. S. Code there arises a right in the plaintiffs not to have their homes searched, without search warrants (cf., particularly Section 300a); and the right not to be deprived of their liberty, so far as arrests without warrants by F. B. I. agents are concerned, except only "where there is a likelihood of the person escaping before a warrant can be obtained for his arrest," and then only where "the person arrested shall be immediately taken before a committing officer."

(The text of this Section, from which the above is quoted, is set forth in Appendix "A," p. 2, to the "Appellants' Opening Brief.")

It may be said also that the construction or effect of Sections 390 and 390a is in issue, in that if the courts give one construction or effect to the limitation of authority conferred upon the defendants by these laws, the appellants will be entitled to prevail; and if the courts give to these sections a different construction or effect, the appellants' cause will be defeated.

[fol. 190] Furthermore, the Proposed Amended Complaint (paragraph I) alleges affirmatively and expressly that the defendants "abused their power and authority as said federal officers, and as said agents of the Federal Bureau of Investigation," *infra*, p. 12.

It is true that the 4th and 5th Amendments, as all of the first ten amendments, are limitations only upon action by the Federal Government. Indeed, they are express guarantees of rights which the Federal Government through its officers may not violate. It does *not* follow, however, that where the rights of a citizen are violated by government officers, *acting in excess of their authority as such*, that the aggrieved citizen has no redress in the federal courts. If this were so, then no suit would ever lie in the federal courts in behalf of the citizen for the vindication of his rights under the Bill of Rights; for if the action of the federal officer is within the scope of his authority, then no suit will lie because the United States may not be sued. Therefore, it is only when federal government officers act in excess of their authority, *i. e.*, where there is an "abuse of power," that a proceeding either by way of injunction or for damages is available in the federal courts. Indeed, it is only in such instances that the citizen desires access to the federal courts. For when government officials act *within* their authority, he has no occasion to sue in the federal courts, or at all.

The phrase "abuse of power" and the principle we have just discussed is considered most adequately by Chief Justice Hughes in *Philadelphia Company v. Stimpson*, 223 U. S. 605, 619. The *Stimpson* case is discussed in our "Appellants' Opening Brief," herein, at page 19. The cases cited in our opening brief at page 14 are considered more fully at pages 16-23 of that brief.

[fol. 191] Of course, it can make no difference whether the suit against a public officer for "abuse of power" is for damages resulting from an abuse committed, or for an injunction to restrain an abuse threatened; for Title 28

U. S. C. A. Sec. 41(1) confers jurisdiction upon the United States District Courts

> "where the matter in controversy * * * arises under the Constitution or laws of the United States * * * of *all* suits of a civil nature at *common law or equity.*" (Italics ours.)

Cf. Mitchell v. Harmony, 13 How. 115, discussed in our opening brief at page 21, as well as the other cases cited at page 14.

II

In Its Discretion, and in the Interests of Justice, This Court May Reverse a Judgment for the Sole Purpose of Remanding It to Permit an Amendment to a Complaint.

Puget Sound Navigation Co. v. Lavendar (9th C. C. A.), 156 Fed. 361.

Cf. the remarks of Judge Taft in *Rondot v. Township of Rogers*, 79 Fed. 677.

Fidelity and Guaranty Fire Corporation v. Bilquist, (9th C. C. A.), 99 F. (2d) 333, on p. 336.

Respectfully submitted, Lorrin Andrews, A. L. Wirin, by A. L. Wirin, Attorneys for Appellants.

[fol. 192] APPENDIX "A"

In the District Court of the United States in and for the Southern District of California, Central Division.

Arthur L. Bell, Individually, and as an Associate of and Division Superintendent of "Mankind United," a Voluntary Association, for and in behalf of said "Mankind United" and The Associates thereof; Maude Askew, Eugene Wadsworth Brown, J. Fred Burkey, Lawrence Cook, A. Ray Elsea, Jacob Gloeckler, Bay Burns Sharp, Shanna Jakeman, Pauline Kelso, Max Theodore Miller and Homer G. Wilcox, Plaintiffs, vs. R. B. Hood, Theodore Cruise, Philip Bowser, George M. Langdon, William Gleson, Eugene Greer, J. H. Angell, J. Secrist, John Roche, Malcom C. Powrie, Cecil C. Humphreys, A. F. Scheinerhorn, William Branigan, John Doe Wolfe, Don C. Swanson, Cecil B. Sherman, Earl K. Adams, Howard H. Davis, Robert

T. Pugh, Edward A. Furbush, O. Wilson Farrell, Dennis G. Smith, Herbert J. Nubish, Robert O'Keefe, Earl P. Staten, Robert Montgomery, Newell Williams, Richard Doe Devine, Richard Doe Bullfrass, John C. Norris, Walt Butler, Mike Cassidy, Paul J. O'Farrell, John W. Schaller, Louis D. Wine, John Philip Manion, Francis John Good, One Doe, Two Doe, Three Doe, Four Doe, Five Doe, Six Doe, Seven Doe, Eight Doe, Nine Doe and Ten Doe, Defendants. No. 2850 RJ Civil.

Proposed Amended Complaint for Damages for False Imprisonment and Unlawful Search and Seizure by Federal Officers.

Come now the plaintiffs and complain against the defendants and each of them and allege:

[fol. 193] I

Jurisdiction of this Court is founded upon a Federal question arising under the Fourth and Fifth Amendments to the Constitution of the United States; and Title 5, U. S. Code; Sections 300 and 300a, as more fully appears hereinafter. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000.00). Jurisdiction of this Court is founded upon the Federal question involving the rights of the individual plaintiffs and each of them to be free from deprivation of liberty without due process of law by false and unlawful imprisonment in violation of the 5th Amendment to the Constitution; and the rights of all of the plaintiffs to be free from unreasonable searches and seizures, in violation of the 4th Amendment. All of the defendants at all times herein were and are officers of the Federal Government, to wit, Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice, and claim to have acted under and by virtue of the provisions of, and under the authority of Section 300 and 300a of Title 5, U. S. Code aforesaid, and as said federal officers, and, within the scope of their authority as said federal officers, and solely because of said authority, and as said officers.

Said defendants and each of them, however, abused their power and authority as said federal officers, and as said agents of the Federal Bureau of Investigation, as will appear more particularly hereinafter.

The District Court of the United States for the Southern District of California has jurisdiction in the premises, more particularly, in that it is a suit of a civil nature arising under the Constitution and the laws of the United States, in the following respects:

[fol. 194] The construction or effect of the following constitutional and statutory provisions is in issue:

A. Constitutional Provisions

1. Whether or not the searches and seizures by the defendants hereinbelow complained of were unreasonable, in violation of the 4th Amendment.

2. Whether or not the imprisonment of the plaintiffs by the defendants to be hereinbelow set forth, deprived the plaintiffs of liberty without due process of law, in violation of the 5th Amendment.

B. Statutory Provisions

1. Whether or not either or both the searches and seizures by the defendants, and the imprisonment of the plaintiffs by the defendants, violated the rights of the plaintiffs conferred upon them by Title 5, U. S. Code, Sections 300 and 300a, by violating the limitations of power imposed upon said defendants by said laws.

II

All the individual plaintiffs aforesaid are, and at all times herein have been, citizens of the United States.

III

The plaintiff, Arthur L. Bell, is and for over eight years has been a resident of the City and County of San Francisco, in the State of California, and has at all times herein been the Division Superintendent for the Pacific Coast Division of "Mankind United."

IV

"Mankind United" is, and for the last eight years has been, a voluntary association consisting of a varying num-
[fol. 195] ber of persons, and consists now in the State of California of a large number of persons, all of whom are

citizens of the United States and residents of the State of California.

Said "Mankind United," a voluntary association, was organized and exists for the following purposes, to-wit: To eliminate illiteracy, poverty and war; to establish world-wide economic equality, based on the principles promulgated by Christ Jesus, including particularly the Golden Rule of Brotherly Love.

Said plaintiff Arthur L. Bell files this suit herein both for himself individually and as an associate and as Division Superintendent of said "Mankind United" for and in behalf of himself as said associate and Division Superintendent, and for and in behalf of all of the associates of said "Mankind United"; the persons constituting said voluntary association being so numerous as to make it impracticable to bring them all before the Court as parties plaintiff herein, and the appearance of the plaintiff, Arthur L. Bell, herein in their behalf, and the representation by the plaintiff Arthur L. Bell of said class will insure the adequate representation of all of said associates, and the character of the rights sought to be enforced in behalf of said class is joint and/or common as will appear more particularly hereinafter.

In addition all of the plaintiffs herein assert a right to relief both jointly and severally in respect to, and arising out of, the same transaction, occurrence or series of transactions or occurrences, and questions both of law and of fact are common to all of the plaintiffs; with respect to all of the defendants joined in the within action, the plaintiffs assert against them both jointly and severally a right to relief in respect to, and arising out of, the same [fol. 196] transaction, occurrence or series of transactions or occurrences; and questions of law and of fact common to all of the defendants will arise in said action.

V

Plaintiff, Maude Askew, resides in the City of San Diego, State of California, and has resided therein for more than six years last past, and that she is a co-worker of "Mankind United";

Plaintiff, Eugene Wadsworth Brown, resides in the City of Los Angeles, State of California, and has resided therein for more than six years last past, and that he is a co-worker and a Bureau Manager of "Mankind United";

Plaintiff, J. Fred Burkey, resides in the City of Oakland, State of California, and has resided therein for more than six years last past, and that he is a co-worker and a Bureau Manager of "Mankind United";

Plaintiff, Lawrence Cook, resides in the City of San Diego, State of California and has resided therein for more than six years last past, and that he is a co-worker of "Mankind United";

Plaintiff, A. Ray Elsea, resides in the City of Los Angeles, State of California, and that he is a co-worker and a Bureau Manager of "Mankind United";

Plaintiff Jacob Gloeckler resides in the city of Dequair, State of California, and has resided therein for more than six years last past, and that he is a co-worker of "Mankind United";

Plaintiff Bay Burns Sharp resides in the City of Fresno, State of California, and has resided therein for more than [fol. 197] six years last past, and that he is a co-worker and a Bureau Manager of "Mankind United";

Plaintiff Shanna Jakeman resides in the City of Los Angeles, State of California, and has resided therein for more than six years last past, and that she is a co-worker of "Mankind United";

Plaintiff Pauline Kelso resides in the City of San Diego, State of California, and has resided therein for more than six years last past, and that she is a co-worker of "Mankind United";

Plaintiff Max Theodore Miller resides in the City of Mountain View, State of California, and has resided therein for more than six years last past, and that he is a co-worker and a Bureau Manager of "Mankind United";

Plaintiff Homer G. Wilcox resides in the City of San Diego, State of California, and has resided therein for more than six years last past, and that he is a co-worker and a Bureau Manager of "Mankind United";

VI

All the defendants herein were, and at all times herein have been residents of the State of California; and the defendants R. B. Hood, J. H. Angell, J. Secrist, Robert T. Pugh, Howard H. Davis, Robert O'Keefe, Earl P. Staten and Newell Williams are, and at all times have been, residents of Los Angeles and or San Diego and within the Southern District of California.

VII

On the 17th day of December, 1942, the individual plaintiffs herein were indicted by the Grand Jury for the Southern District of California, charged with a violation of Section 345 Title 50, U. S. Code;

[fol. 198] VIII

All the defendants herein, at all times herein, acted in concert and pursuant to an understanding and agreement so to act, which said agreement and understanding was entered into by all of the defendants on or about December 16 or 17, 1942.

Some of the defendants, pursuant to said understanding and agreement committed the following acts, with respect to each of the plaintiffs, as follows:

(1) Arthur L. Bell:

At about 7:30 o'clock in the morning of the 18th day of December, 1942, the defendants, Theodore Cruise, Philip Bowser, George M. Langdon, William Gleson, Eugene Greer, One Doe and Two Doe, did break open the doors of the residence of plaintiff Arthur L. Bell at San Francisco, California, and entered upon his premises and announced to said plaintiff that he was under arrest. They did not produce an order or warrant of arrest or search and seizure, nor did they have either a warrant of arrest or search warrant. Said defendants proceeded without the consent and against the will of said Arthur L. Bell to search the entire premises in which he lives. After searching the entire premises and leaving the same in great confusion and disorder, said defendants took this plaintiff from the premises but did not bring him before any committing officer until the hour of two o'clock in the afternoon although holding him in custody during all of said time at his residence; and they did take from his premises thousands of documents, papers, records and other property belonging to "Mankind United" and entrusted to the keeping of this plaintiff, as well as many private documents, papers and other personal properties belonging to this plaintiff and his wife; also the [fol. 199] sum of approximately eight thousand five hundred ($8,500.00) dollars in funds of said "Mankind United".

The property taken from said premises, in addition to

the money in question, included personal documents, automobile insurance policies, private papers of this plaintiff's wife, records and documents for two safe-deposit boxes, thousands of receipts for monies expended, letter files and thousands of other papers and documents.

Said defendants, Theodore Cruise, Philip Bowser, George M. Langdon, William Gieson, Eugene Greer, Doe One and Doe Two, remained upon the premises from approximately 8:00 o'clock a.m. the morning to 2:30 o'clock in the afternoon, and removed from this plaintiff's premises twelve large cartons and packages containing "Mankind United" property entrusted to this plaintiff by said "Mankind United" and necessary for the past and present records of the same; the complete contents of said cartons and packages this plaintiff was not informed of at that time, nor since, by said defendants, nor was plaintiff permitted by said defendants to take a list of the same other than the number of cartons removed from the premises.

During the time when he was imprisoned by the defendants in his premises as aforesaid plaintiff, Arthur L. Bell, was not permitted to see his attorney although said attorney was waiting in the hall outside the door, and did so wait for over five hours, said attorney having been refused permission by these defendants to enter said home of the plaintiff; nor was plaintiff allowed to have any counsel although questioned by the said defendants for the purpose of obtaining evidence against him in connection with the indictment above set forth, nor was plaintiff allowed to speak [fol. 200] with, or obtain advice from, any other person, nor to use his telephone, in all to his damage as hereinafter set forth.

(2) Maude Askew:

At about the hour of 7:30 in the morning of the 15th day of December, 1942, the defendants Carl B. Sherman and Earl K. Adams entered the premises of plaintiff Maude Askew, and announced that she was under arrest and stated that they were agents of the Federal Bureau of Investigation; they did not show her a warrant of search and seizure, but imprisoned her upon said premises and stated to her that they did not need a warrant for search and seizure so long as they were making an arrest, and declared that they would assume responsibility for searching said premises and, against the will and without the consent of said

plaintiff, did search and take from said premises a large number of documents, papers and other property belonging to "Mankind United" and entrusted to the keeping of this plaintiff, Maude Askew, as well as many private documents, papers and other personal property belonging to this plaintiff; and said defendants did not take her before a committing magistrate, but did take her to the city jail in the City of San Diego, State of California, and there kept her imprisoned until noon Saturday, without arrangement before any committing magistrate whatsoever, in all to her damage as hereinafter set forth.

(3) Eugene Wadsworth Brown:

At about the hour of 7:30 in the morning of the 18th day of December, 1942, defendants Edward A. Furbush and Three Doe and Four Doe did enter upon the premises of plaintiff Eugene Wadsworth Brown, showing to him [fol. 201] cards of identification as agents of the Federal Bureau of Investigation and stating that this plaintiff was under arrest, producing what they called a "bench warrant" under a secret indictment and showing same to this plaintiff. That said defendants did not produce any warrant of search or seizure, and stated that they had no such warrant, that such a warrant was not necessary as long as they had a warrant for plaintiff's arrest. That said defendants proceeded, against the protest and will of this plaintiff, to search the premises in which he lives. That said defendants then proceeded to seize and take away papers and documents, together with one or more moving picture films, the property of "Mankind United" and entrusted to this plaintiff. That upon their entering the premises of said plaintiff Eugene Wadsworth Brown, defendants kept the same Brown as their prisoner in said premises, did not permit him to leave and illegally detained him for the space of approximately 7½ hours, during which time, and until 3:00 or 3:30 p. m. of said day, they neglected and refused to take this plaintiff before a committing officer and held him as a prisoner and searched his entire premises without permitting him to be present, except for a very short time. When said plaintiff was taken by said defendants to the county jail he was not brought before a committing officer until 4:00 p. m. During all of the time that said plaintiff was in the county jail he was held incommunicado by said defendants or their agents, not allowed to tele-

phone anyone or to see a lawyer. Said defendants ransacked the entire home of this plaintiff. They not only took articles in full view, but opened and searched drawers, shelves and forced one or more locked drawers. After this plaintiff was taken to the county jail, the defendants remained on his premises without right or warrant and, on information and belief, the plaintiff alleges said defendant [fol. 202] continued to make an extensive search thereof, in all to his damage as hereinafter set forth.

(4) J. Fred Burkey:

At about the hour of 7:30 in the morning of the 18th day of December, 1942, defendants Cecil C. Humphreys, A. F. Scheimerhorn and William Branigan, entered the premises of plaintiff J. Fred Burkey, and announced that he, the said Burkey, was under arrest. Said defendants did not exhibit any warrant of arrest, or any warrant for search or seizure of this plaintiff's premises. Against the protests of this plaintiff and without his consent, they proceeded to search the premises in which he lives and took therefrom a large quantity of documents, records and papers belonging to "Mankind United" and entrusted to this plaintiff. Said defendants refused to permit said plaintiff, J. Fred Burkey, to leave his home, and illegally imprisoned him in said premises without taking him before a committing officer for arraignment; for the space of more than five hours said defendants detained this plaintiff in said premises while they searched every room of the same and took therefrom a large number of pamphlets, records and other documents, some belonging to "Mankind United" and in this plaintiff's custody and others belonging to him personally, in all to his damage as hereinafter set forth.

(5) Lawrence Cook:

At about the hour of 7:30 in the morning of the 18th day of December, 1942, defendants, O. Wilson Farrell, Dennis G. Smith and Herbert J. Nubish, forced their way into plaintiff Lawrence Cook's home, and announced that he was under arrest, producing a warrant of arrest. Said [fol. 203] defendants did not produce any warrant for search or seizure. Instead of removing said plaintiff from the premises and arraigning him before a committing officer, against the consent and will of this plaintiff, said defendants searched the entire premises in which he lives, seizing

and carrying away great numbers of books, papers and other articles belonging to "Mankind United" entrusted to this plaintiff's care by said "Mankind United"; also a great many documents, papers and other personal property belonging to this plaintiff, and they forcibly detained said plaintiff upon said premises after he had been placed under arrest for approximately six hours, in all to his damage as hereinafter set forth.

(6) A. Ray Elsea:

At about the hour of 7:30 in the morning of the 18th day of December, 1942, defendants, J. H. Angell, J. Secrist, John Roche and Malcolm C. Powrie, did with force and arms enter the premises of plaintiff A. Ray Elsea, and produced a warrant of arrest. Against this plaintiff's will, and without his consent, said defendants proceeded to search the home in which this plaintiff lives with his wife, and to seize all of his books and papers, indiscriminately helping themselves to papers, documents and effects belonging to this plaintiff as well as those entrusted to him by "Mankind United"; and they carried large bundles away from said premises. Included among the papers taken were all of this plaintiff's wife's records concerning a completion of income tax and sales tax returns which it was necessary for her to immediately prepare and file. Said defendants imprisoned this plaintiff in his home from the hour of approximately 7:00 a. m. until approximately 2:00 p. m. Instead of removing said plaintiff from the premises and arraigning him before a committing officer, said defend-
[fol. 204] ants forcibly detained this plaintiff upon said premises after he had been placed under arrest for approximately seven hours, in all to his damage as hereinafter set forth.

(7) Jacob Gloeckler:

At about the hour of 7:30 in the morning of the 18th day of December, 1942, defendants, John C. Norris, Walt Butler, Mike Cassidy and Paul J. O'Farrell, did enter upon the premises of plaintiff, Jacob Gloeckler, showed this plaintiff cards of identification as agents of the Federal Bureau of Investigation, forced their way into this plaintiff's house and announced that said plaintiff was under arrest. They did not produce any warrant of arrest, nor did they produce any warrant of search and seizure. Said defendants pro-

ceeded, against the consent and will of this plaintiff, to search the premises in which he lived. Said defendants also informed this plaintiff and his wife that they knew their rights, that it was not necessary for them to have either a warrant of arrest or a warrant of search and seizure, and that they were acting under instructions. After searching the entire premises, these defendants seized this plaintiff and took him from the premises together with a great number of documents, papers and records of "Mankind United" entrusted to this plaintiff's care, also a great number of documents and personal property belonging to said plaintiff and his wife. These defendants forced, under threat, this plaintiff and his wife to fill out a questionnaire in the handwriting of the plaintiff and his wife; and to sign the same; and under threat said defendants dictated the answers this plaintiff and his wife were to make to said questionnaire; said defendants took said questionnaire away with them. For approximately four and one-half hours this plaintiff was imprisoned by said defendants upon his premises with-
[fol. 205] out being taken before a committing officer, in all to his damage as hereinafter set forth.

(8) Bay Burns Sharp:

At about the hour of 7:30 in the morning of the 18th day of December, 1942, defendant, Howard H. Davis did enter upon the premises of plaintiff, Bay Burns Sharp, announced that this plaintiff was under arrest and showed him a warrant of arrest, but did not present to this plaintiff any warrant of search and seizure. Said defendant took this plaintiff to the United States Marshal's office in the Federal Building, Fresno, California. This plaintiff has been informed and believes, and therefore alleges that without any further exhibition of warrant of search and seizure, after plaintiff's removal to prison, seven agents of the Federal Bureau of Investigation, including some of the defendants herein, searched his entire premises, took a great number of documents, papers, records and other personal property therefrom, in all to his damage as hereinafter set forth.

(9) Shanna Jakeman:

At about the hour of 7:30 in the morning of the 18th day of December, 1942, defendants, Robert T. Pugh and others, to the plaintiff unknown, forced an entrance upon

the premises of plaintiff Shanna Jakeman. This plaintiff was in bed, being quite ill. Said defendants pushed their way inside and told plaintiff that they had come to arrest her, stating that they were Federal Bureau of Investigation agents. Said defendants did not produce a warrant of arrest, nor a search and seizure warrant, but proceeded to search plaintiff's home. After this plaintiff had dressed [fol. 206] herself to go with them, said defendants required plaintiff to remain in the living room. While in her home said defendants presented to this plaintiff a paper and told her that if she did not sign same, they would get a warrant and it would be hard on her. Under duress, this plaintiff signed said paper. Said defendants remained in this plaintiff's home for about five hours searching same behind closed doors, after searching the living room where plaintiff was compelled to stay. During all of said period of time this plaintiff was imprisoned by said defendants and detained in her home, without being taken before a committing officer. Said defendants seized and took away papers and documents belonging to this plaintiff including her private letters and other personal property; among the articles taken by said defendants were charts, pictures and other matter being personal property in connection with plaintiff's study of "Mankind United." After thoroughly searching the entire premises, said defendants took this plaintiff to an office on Spring Street, being the office of the Federal Bureau of Investigation, where they asked her a great many questions. This plaintiff was kept in said office for approximately one and one-half hours, at which time she became so faint and ill from lack of nourishment that she could no longer answer questions; and said defendants took her to the county jail in the City of Los Angeles without having been first arraigned before any committing officer, in all to her damage as hereinafter set forth.

(10) Pauline Kelso:

At about the hour of 7:30 in the morning of the 18th day of December, 1942, defendants John Doe Wolfe and Don C. Swanson, did enter the premises of plaintiff Pauline Kelso, and announced that plaintiff was under arrest. They, [fol. 207] John Doe Wolfe and Don C. Swanson, against the consent and will of said plaintiff, proceeded to search the premises in which this plaintiff lives. Although plaintiff protested against such search and seizure, said defend-

ants produced no warrant for search and seizure. Having imprisoned her in said premises from 7:30 in the morning until in the afternoon, they took this plaintiff, together with the papers, documents and effects which they had seized, to the San Diego County jail where she was confined without being taken before a committing officer until noon Saturday, in all to her damage as hereinafter set forth.

(11) Max Theodore Miller:

At about the hour of 7:30 o'clock in the morning of the 18th day of December, 1942, defendants, John W. Schaller, Louis D. Wine, Four Dee and Five Doe, did, with a revolver force their entrance into the premises of plaintiff Max Theodore Miller, and announced that this plaintiff was under arrest. Said defendants did not produce any warrant of arrest, nor did they produce any warrant of search and seizure. Said defendants proceeded, without the consent and against the will of this plaintiff, to search the premises on which he lives. Upon the United States Postman delivering a registered letter addressed to this plaintiff, said defendants seized the same, opened it and removed the contents. Said defendants seized and carried away from this plaintiff's premises a great number of documents belonging to "Mankind United" and entrusted to the care of said plaintiff; said defendants also took away documents and other personal property belonging to this plaintiff and his wife, including the sum of one thousand two hundred one and 85/100 ($1,201.85) dollars. The property taken from said premises by said defendants included, in addition [fol. 208] to the money in question, a strong box, together with personal documents, private papers of this plaintiff's wife and all other documents and records which said defendants found in the strong box, including automobile insurance policies. Said defendants searched the private purse of plaintiff's wife, removing and seizing therefrom receipts, including a money order receipt, also a booklet entitled, "The Law and Gospel of Economics." Said defendants remained upon this plaintiff's premises from approximately 7:30 a. m. until 12:30 p. m., during all of which time this plaintiff was held a prisoner by said defendants without being taken before a committing officer for arraignment, in all to the damage of said plaintiff as hereinafter set forth.

(12) Homer G. Wilcox:

At about the hour of 7:30 in the morning of the 18th day of December, 1942, defendants, Robert O'Keefe, Earl P. Staten, Robert Montgomery, Newell Williams and Adam Wolf, did force their way into the premises of plaintiff Homer G. Wilcox, showed this plaintiff cards of identification as agents of the Federal Bureau of Investigation, and announced that plaintiff was under arrest. They produced a warrant of arrest and stated that that permitted them to search anything they wanted to on plaintiff's premises. Said defendants, against the consent and will of this plaintiff, searched his home. Said defendants seized and took away papers and documents, together with moving picture films, stereopticon slides, maps, etc. After such search and seizure these defendants seized this plaintiff and took him, together with all the papers, documents seized, from the premises. During all the time said defendants were carrying on their search and seizure of plaintiff's premises and [fol. 209] property, this plaintiff was held a prisoner in his home without being taken before a committing officer for arraignment, in all to his damage as hereinafter set forth.

IX

The plaintiffs, and all of them, have been for many years residents of the State of California, and were teachers and ministers preaching the Gospel of "Mankind United." They were handling the business affairs of said "Mankind United" in their respective territories. None of them had, prior to the indictment on December 17, 1942, heretofore referred to, been convicted of, or indicted for, any offense. They have no other home or occupation other than as such ministers and teachers within the State of California; and there was no reason or probability or likelihood of any of them leaving the State of California, all of which facts were well known to the defendants who had secretly made careful investigations in connection with all of the actions and doings of said plaintiffs for a long period of time last past.

X

In no instance aforesaid did the defendants, or any of them, have a search warrant to search the premises of any of the plaintiffs, nor had such a search warrant been issued.

XI

In each instance aforesaid where an arrest was made without a warrant of arrest, the defendants had no reasonable or any ground to believe that the plaintiff so arrested was guilty of a felony cognizable under the laws of the United States, nor had a violation of Title 50, Sec. 34, taken [fol. 210] place; nor, as aforesaid, was there any likelihood that any of the individual plaintiffs would escape before a warrant could be obtained for his arrest; nor, as aforesaid, were any of the individual plaintiffs taken immediately or within a reasonable time before a committing officer.

XII

As the result of said actions of the defendants, the plaintiffs have suffered the following damages:

(1) Plaintiff, "Mankind United," has suffered damages in the sum of one hundred thousand ($100,000.00) dollars.

(2) Plaintiff, Arthur L. Bell, individually, by reason of the search of his home and the seizure of his books, papers and effects, has suffered damages in the sum of five thousand ($5,000.00) dollars; by reason of his false imprisonment this plaintiff has suffered damages in the sum of fifty thousand ($50,000.00) dollars; and by reason of the deprivation of his Constitutional rights, mental pain, anguish and suffering, and injury to his reputation, said plaintiff has suffered damages in the sum of one hundred thousand ($100,000.00) dollars; in all to his damage one hundred fifty-five thousand ($155,000.00) dollars.

(3) Plaintiff, Maude Askew, by reason of the breaking into and entering of her premises by the defendants aforesaid, has suffered damages in the sum of five thousand ($5,000.00) dollars; by reason of her false imprisonment, this plaintiff has suffered damages in the sum of twenty thousand ($20,000.00) dollars; and by reason of the deprivation of her Constitutional rights, mental pain, anguish, suffering and injury to her reputation, plaintiff has suffered damages in the sum of fifty thousand ($50,000.00) dollars; [fol. 211] in all to her damage seventy-five thousand ($75,000.00) dollars.

(4) Plaintiff, Eugene Wadsworth Brown, by reason of the breaking into and entering of his premises by the de-

fendants aforesaid, has suffered damages in the sum of five thousand ($5,000.00) dollars; by reason of his false imprisonment, this plaintiff has suffered damages in the sum of twenty thousand ($20,000.00) dollars; and by reason of the deprivation of his Constitutional rights, mental pain, anguish, suffering and injury to his reputation, plaintiff has suffered damages in the sum of fifty thousand ($50,000.00) dollars; in all to his damage seventy-five thousand ($75,000.00) dollars.

(5) Plaintiff, J. Fred Burkey, by reason of the breaking into and entering of his premises by the defendants aforesaid, has suffered damages in the sum of five thousand ($5,000.00) dollars; by reason of his false imprisonment this plaintiff has suffered damages in the sum of twenty thousand ($20,000.00) dollars; and by reason of the deprivation of his Constitutional rights, mental pain, anguish, suffering and injury to his reputation, plaintiff has suffered damages in the sum of fifty thousand ($50,000.00) dollars; in all to his damage seventy-five thousand ($75,000.00) dollars.

(6) Plaintiff, Lawrence Cook, by reason of the breaking into and entering of his premises by the defendants aforesaid has suffered damages in the sum of five thousand ($5,000.00) dollars; by reason of his false imprisonment this plaintiff has suffered damages in the sum of twenty thousand ($20,000.00) dollars; and by reason of the deprivation of his Constitutional rights, mental pain, anguish, suffering and injury to his reputation, plaintiff has suffered damages in the sum of fifty thousand ($50,000.00) dollars, [fol. 212] in all to his damage seventy-five thousand ($75,000.00) dollars.

(7) Plaintiff, A. Ray Elsea, by reason of the breaking into and entering of his premises by the defendants aforesaid, has suffered damages in the sum of five thousand ($5,000.00) dollars; by reason of his false imprisonment, this plaintiff has suffered damages in the sum of twenty thousand ($20,000.00) dollars; and by reason of the deprivation of his Constitutional rights, mental pain, anguish, suffering and injury to his reputation, plaintiff has suffered damages in the sum of fifty thousand ($50,000.00) dollars; in all to his damage seventy-five thousand ($75,000.00) dollars.

(8) Plaintiff, Jacob Gloeckler, by reason of the breaking into and entering of his premises by the defendants aforesaid, has suffered damages in the sum of five thousand ($5,000.00) dollars; by reason of his false imprisonment, this plaintiff has suffered damages in the sum of twenty thousand ($20,000.00) dollars; and by reason of the deprivation of his Constitutional rights, mental pain, anguish, suffering and injury to his reputation, plaintiff has suffered damages in the sum of fifty thousand ($50,000.00) dollars; in all to his damage seventy-five thousand ($75,000.00) dollars.

(9) Plaintiff, Bay Burns-Sharp, by reason of the breaking into and entering of his premises by the defendants aforesaid, has suffered damages in the sum of five thousand ($5,000.00) dollars; by reason of his false imprisonment plaintiff has suffered damages in the sum of twenty thousand ($20,000.00) dollars; and by reason of the deprivation of his Constitutional rights, mental pain, anguish, suffering and injury to his reputation, plaintiff has suffered damages in the sum of fifty thousand ($50,000.00) [fol. 213] dollars; in all to his damage seventy-five thousand ($75,000.00) dollars.

(10) Plaintiff, Shanna Jakeman, by reason of the breaking into and entering of her premises by the defendants aforesaid, has suffered damages in the sum of five thousand ($5,000.00) dollars; by reason of her false imprisonment, this plaintiff has suffered damages in the sum of twenty thousand ($20,000.00) dollars; and by reason of the deprivation of her Constitutional rights, mental pain, anguish, suffering and injury to her reputation, plaintiff has suffered damages in the sum of fifty thousand ($50,000.00) dollars; in all to her damage seventy-five thousand ($75,000.00) dollars.

(11) Plaintiff, Pauline Kelso, by reason of the breaking into and entering her premises by the defendants aforesaid, has suffered damages in the sum of five thousand ($5,000.00) dollars; by reason of her false imprisonment, this plaintiff has suffered damages in the sum of twenty thousand ($20,000.00) dollars; and by reason of the deprivation of her Constitutional rights, mental pain, anguish, suffering and injury to her reputation, plaintiff has suffered damages in the sum of fifty thousand ($50,-

000.00) dollars; in all to her damage seventy-five thousand ($75,000.00) dollars.

(12) Plaintiff, Max Theodore Miller, by reason of the breaking into and entering of his premises by the defendants aforesaid, has suffered damages in the sum of five thousand ($5,000.00) dollars; by reason of his false imprisonment this plaintiff has suffered damages in the sum [fol. 214] of twenty thousand ($20,000.00) dollars; and by reason of the deprivation of his Constitutional rights, mental pain, anguish, suffering and injury to his reputation, plaintiff has suffered damages in the sum of fifty thousand ($50,000.00) dollars; in all to his damage seventy-five thousand ($75,000.00) dollars.

(13) Plaintiff, Homer G. Wilcox, by reason of the breaking into and entering of his premises by the defendants aforesaid, has suffered damages in the sum of five thousand ($5,000.00) dollars; by reason of his false imprisonment, this plaintiff has suffered damages in the sum of twenty thousand ($20,000.00) dollars; and by reason of the deprivation of his Constitutional rights, mental pain, anguish, suffering and injury to his reputation, plaintiff has suffered damages in the sum of fifty thousand ($50,000.00) dollars; in all to his damage seventy-five thousand ($75,000.00) dollars.

Wherefore, plaintiffs pray for judgment against the defendants and each of them as follows:

1. Arthur L. Bell, in behalf of "Mankind United"; one hundred thousand ($100,000.00) dollars;

2. Arthur L. Bell, individually: One hundred fifty-five thousand ($155,000.00) dollars;

3. Maude Askew: Seventy-five thousand ($75,000.00) dollars;

4. Eugene Wadsworth Brown: seventy-five thousand ($75,000.00) dollars;

[fol. 215] 5. J. Fred Burkey: Seventy-five thousand ($75,000.00) dollars;

6. Lawrence Cook: Seventy-five thousand ($75,000.00) dollars;

7. A. Ray Elsea: Seventy-five thousand ($75,000.00) dollars;

8. Jacob Gloeckler: Seventy-five thousand ($75,000.00) dollars;

9. Bay Burns Sharp: Seventy-five thousand ($75,000.00) dollars;

10. Shanna Jakeman: Seventy-five thousand ($75,000.00) dollars;

11. Pauline Kelso: Seventy-five thousand ($75,000.00) dollars;

12. Max Theodore Miller: Seventy-five thousand ($75,000.00) dollars;

13. Homer G. Wilcox: Seventy-five thousand ($75,000.00) dollars;

Wherefore, plaintiffs further pray for such other and further relief as to the court may seem just and proper, and for their costs and disbursements.

A. L. Wirin and J. B. Tietz, Russell E. Parsons, by A. L. Wirin, Attorneys for Plaintiffs.

[fols. 216-217] *Duly sworn to by A. Ray Elsea. Jurat omitted in printing.*

[fols. 218-220] [File endorsement omitted]

[fol. 221] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

BRIEF OF APPELLEES IN OPPOSITION OF MOTION TO REVERSE JUDGMENT—Filed April 26, 1945

Preliminary Statement

Appellants seek an order reversing the judgment of the District Court and instructing the District Court to grant leave to appellants to file an amended complaint. The cases cited by appellants in support of their motion (page 9 of appellants' Points and Authorities in support of the motion) are not in point.

Thus in *Fidelity and Guaranty Fire Corp. v. Bilquist*, 99 Fed. (2d) 333, cited by appellants, the amendment of the pleadings was permitted on the theory of reformation under the direct statutory authority of Judicial Code 274 a, 28 U. S. C. A. 397, which provides:

> "In case any United States court shall find that a suit at law should have been brought in equity . . . [fol. 222] the court shall order any amendments to the pleadings which may be necessary to conform them to proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings . . . "

In *Puget Sound Navigation Co. v. Lavendar* (9th C. C. A.) 156 Fed. 361 (1907) a judgment of the District Court in favor of plaintiff was reversed by the Circuit Court for want of jurisdiction because the complaint failed properly to allege diversity of citizenship. The judgment was reversed and remanded to the District Court with *leave to apply for amendment*. It should be emphasized that the term "leave to apply" is permissive and not a direction. It should also be noted that the defect was purely a technical one, an inadvertent omission of a necessary allegation in the complaint.

The jurisdictional deficiency in the original complaint filed by appellants is one going directly to the substance of appellants' cause of action.

Appellants here ask for an order *reversing* the judgment of the District Court. Such a *reversal* would be an express recognition that the *original complaint* states a cause within the jurisdiction of the Federal Courts. The proposal to amend the complaint would, therefore, be unnecessary.

Appellants' right to amend must now be determined under Rule 15a of the Federal Rules of Civil Procedure or under such other of said rules which might afford them relief. These rules are outlined and discussed in our subsequent argument.

[fol. 223] In the instant case the defect in jurisdiction is one of substance and not merely an inadvertent failure to

include a jurisdictional statement. The basis of the lower court's decision and of our argument submitted in the Circuit Court in support of such decision, went to the substance of the complaint upon the same facts realleged in the proposed amended complaint.

I.

No Dispensing Power Exists in the Circuit Court of Appeals to Permit the Relief Sought by Appellants

It is appellees' contention that the power of the Circuit Court is only to review for error the record on appeal from proceedings in the District Court. It is not contended that appellants might not dismiss the pending appeal and apply to the District Court to vacate its judgment and permit an amended complaint to be filed. However, it should be noted that such a motion addressed to the District Court would come within Rule 60(b) of the Federal Rules of Civil Procedure which requires such motion to be made within six months after the judgment was taken. In the instant case far more than six months have run since the entry of the judgment dismissing the action for want of jurisdiction on April 20, 1944 [Tr. pp. 136-138].

A case squarely in point is that of *United States v. Newbury Mfg. Co.*, 123 Fed. (2d) 453, wherein the Circuit Court of Appeals of the First Circuit ruled adversely upon a similar motion. In that case the United States as plaintiff brought three actions for breach of contract. In each case motions of the defendant for dismissal were granted on [fol. 224] the grounds that the complaints failed to state causes of action. The plaintiff did not move in the District Court for leave to amend but filed notices of appeal from the judgments of dismissal in all three cases which were consolidated upon appeal. Within the six months limitation imposed by Rule 60(b) of the Federal Rules of Civil Procedure plaintiff requested the District Judge to ask the Circuit Court to remand the cases so that motions for leave to file amended complaints could be filed in the court below. The District Judge refused to make the request.

After the expiration of the six months period, within which relief might have been sought in the District Court, the plaintiff-appellant moved the Circuit Court to vacate the judgments of dismissal and to remand the cases to

the District Court so that appropriate motions for leave to amend might be made. We quote at length from the decision as it seems to afford a complete answer to the contention of appellants in the present case:

"Before considering what action we ought to take on the pending motion, *it is in order to inquire what power the District Court would have had as to allowance of amendments had no appeals been taken to this court.* Rule 15(a), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, provides:

"'(a) Amendments. A party may amend his pleading once as matter of course at any time before a responsive pleading is served or, if the pleading is [fol. 225] one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.'

"Apparently a motion to dismiss is not a 'responsive pleading' within the meaning of the rule. Cf. Rules 7(a) and 12(b). Therefore, by a literal reading of Rule 15(a) it might be argued that a plaintiff would be entitled as of right to one amendment of his complaint, without any limit of time, despite the filing of a motion to dismiss. However, *it could hardly have been intended that a plaintiff should have the right to amend without limit of time after a judgment of dismissal had been entered; nor could it have been intended that the trial court should have discretionary power for an unlimited time after such judgment of dismissal to vacate the judgment and allow an amendment of the complaint.* Such a construction of Rule 15(a) would be out of harmony with Rule 59(b) which narrowly limits the period within which a motion for a new trial can be made after the entry of judgment.

"Presumably the District Court has some discretionary power, after a judgment of dismissal, to vacate the judgment and to allow the filing of an amended complaint, even though the judgment does not expressly reserve leave to amend. See Earhart v. Valerius, D. C. W. D. Mo. 1938, 25 F. Supp. 754. But *it*

seems likely that this discretionary power to vacate [fol. 226] *the judgment of dismissal can be invoked only upon motion made within six months after its entry, as provided in Rule 60(b).* See Kroell v. New York Ambassador, Inc., 2 Cir., 1939, 108 F. 2d 294, 296. However, we need not decide this point at the present time.

"*If power would now lie in the District Court to allow an amendment except for the fact that the appeals are pending, the plaintiff could move in this court to dismiss its appeals, and thus restore the jurisdiction of the District Court.* Greene v. United Shoe Machinery Co., 1 Cir., 1903, 124 F. 961; Baltimore S. S. Co. v. Phillips, 2 Cir., 1925, 9 F. 2d 902, 903. Or, in the alternative, *we might upon request from the District Court remand the cases, which would amount to a dismissal of the appeals.* Roemer v. Simon 1875, 91 U. S. 149, 23 L. Ed. 267; Mossberg v. Nutter, 1 Cir., 1903, 124 F. 966; Cimiotti Unhairing Co. v. American Unhairing Machine Co., 2 Cir., 1903, 99 F. 1003.

"The procedure is discussed by the court in Baltimore S. S. Co. v. Phillips, supra, 9 F. 2d at page 903 as follows:

"'Of course, the appellant may always move to dismiss his appeal (Greene v. United, etc. Co. (1 Cir.), 124 F. 961, 60 C. C. A. 93), and no request is necessary for that purpose. *But in so doing he risks all on his case in the District Court, for it may be too late after decision for a new appeal.* Similarly, if on the appellant's motion the District Court asks for a remittitur before deciding the motion, as was apparently [fol. 227] the case in Mossberg v. Nutter (1 Cir.) 124 F. 966, 60 C. C. A. 98, and as the District Court did in the case at bar. *The safest way is for the District Court if disposed to entertain the motion at all, to ask leave of this court to do so. If this is given, it may proceed, the appeal still pending. Should it decide to reopen, it may then request remittitur, and the appellant will have risked nothing.* This was the course approved by the Circuit Court of Appeals for the Sixth Circuit in Meccano v. Wagner, 235 F. 890, and we also approve it. Sundh Elec. Co. v. Cutler-Hammer Mfg. Co. (2 Cir.), 244 F. 163, 170, 171, 156 C. C. A. 591.'

"But the foregoing is on the assumption, which we deem highly questionable here, that a motion for leave to amend the complaints would still be timely if the District Court should now reacquire jurisdiction of the cases by dismissal of the appeals. Taking, however, the other assumption, namely, that under Rule 60(b) the District Court could not vacate its judgments of dismissal for the purpose of allowing an amendment when motion for leave to amend is filed after the expiration of six months from the entry of the judgments, *the plaintiff would gain nothing by a simple remand of the cases to the District Court.*

"The plaintiff does not now ask for a dismissal of its appeals. Nor has the District Court requested us to remand the cases so that it might entertain motions for leave to amend the complaints. Nor does the plaintiff ask us now to review the record on the merits for the purpose of determining whether it contains any [fol. 228] error, and after such review to remand the cases for such further proceedings as justice might require. 28 U. S. C. A. Secs. 876, 877. Upon the contrary, *we are asked, without review of the merits in the exercise of our appellate power, to vacate the judgments below, and thus to remove the obstacle to the allowance of an amendment which the plaintiff rightly fears may exist in the terms of Rule 60(b). We are unable to find any such dispensing power in the Circuit Court of Appeals.* See Roemer v. Simon, 1895, 91 U. S. 149, 23 L. Ed. 267; Realty Acceptance Corp. v. Montgomery, 1932, 284 U. S. 547, 52 S. Ct. 215, 76 L. Ed. 476; Marden v. Campbell Printing-Press & Mfg. Co., 1 Cir., 1895, 67 F. 809. Even if we had such power, we should be disinclined to exercise it in the absence of a request by the District Court. And the case would have to be an extra-ordinary one indeed for us to exercise the power in the face of an express refusal of the court below, as here, to make the request. We perceive no such extraordinary circumstances in the cases now before us.

"The motion to vacate and remand is denied." (Emphasis ours.)

As in the case cited, this Honorable Court is asked without a review of merits in the exercise of the appellate

power, to vacate the judgment below and thus to remove the obstacle to the allowance of an amendment. Such dispensing power does not exist in the Circuit Court of Appeals under the authorities cited in the quotation above.

[fol. 229] II

The Proposed Amended Complaint Does Not Supply the Jurisdictional Deficiencies Existing in the Original Complaint.

The proposed amended complaint submitted by appellants drops the allegation of conspiracy contained in the original complaint. This is patently intended to meet the comment of this court upon the prior argument on the merits that Federal Officials as such could not conspire to do an unlawful act and that the allegation of such a conspiracy served to emphasize that the appellees were acting as individuals. There is no change of substance in the proposed amendment and it should be particularly noted that the allegation of concerted action remains (see appendix (A) of appellants' Brief in Support of Motion, p. 17). In paragraph 8 of the proposed amended complaint appears the following allegation:

> "All the defendants herein, at all times herein, acted in concert and pursuant to an understanding and agreement so to act, which said agreement and understanding was entered into by all of the defendants on or about December 16 or 17, 1942.
>
> "Some of the defendants, pursuant to said understanding and agreement committed the following acts, with respect to each of the plaintiffs, as follows:"

While appellants in the proposed amended complaint have changed their jurisdictional statement to such an extent as to amount almost to argument, there is no change in the factual matter alleged and upon which jurisdiction must be based. The substance and allegations of concerted action remain.

[fols. 230-231] The authorities submitted in appellees' brief in the original appeal are equally applicable to the proposed amended complaint which, however, is not properly before this court for review. The relief sought by appellants is putting the cart before the horse in that it requests the Circuit Court of Appeals to review and ap-

prove in advance a pleading which must necessarily be filed in the District Court and then only after leave in the district court has been obtained to permit its filing.

Conclusion

In opposition to appellants' motion appellees respectfully submit:

1. That the Circuit Court of Appeals is without the power to grant the relief sought by appellants;

2. That the remanding of the case to the District Court would be an idle act since Rule 60(b) F.R.C.P. would prevent the District Court from granting a motion for leave to file an amended complaint;

3. That the proposed amended complaint does not correct the deficiencies upon which the District Court based its ruling dismissing the original complaint.

Respectfully submitted, Charles H. Carr, United States Attorney; Ronald Walker, Assistant United States Attorney, Attorneys for Appellees.

[fol. 232] Supreme Court of the United States

Order Allowing Certiorari—Filed October 22, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

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AUG 20 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 344

ARTHUR L. BELL, INDIVIDUALLY, AND AS AN ASSOCIATE OF AND DIVISION SUPERINTENDENT OF "MANKIND UNITED," A VOLUNTARY ASSOCIATION, FOR AND IN BEHALF OF SAID "MANKIND UNITED" AND THE ASSOCIATES THEREOF; MAUDE ASKEW, EUGENE WADSWORTH BROWN, J. FRED BURKEY, LAWRENCE COOK, A. RAY ELSEA, JACOB GLOCKLER, BAY BURNS SHARP, SHANNA JAKEMAN, PAULINE KELSO, MAX THEODORE MILLER AND HOMER G. WILCOX,

Petitioners,

vs.

R. B. HOOD, THEODORE CRUISE, PHILIP BOWSER, GEORGE M. LANGDON, WILLIAM GIESON, EUGENE GREER, J. H. ANGELL, J. SECRIST, JOHN ROCHE, MALCOM C. POWRIE, CECIL C. HUMPHREYS, A. F. SCHEIMERHORN, WILLIAM BRANIGAN, JOHN DOE WOLFE, DON C. SWANSON, CARL B. SHERMAN, EARL K. ADAMS, HOWARD H. DAVIS, ROBERT T. PUGH, EDWARD A. FURBUSH, O. WILSON FARRELL, DENNIS G. SMITH, HERBERT J. NUBLISH, ROBERT O'KEEFE, EARL P. STATEN, ROBERT MONTGOMERY, NEWELL WILLIAMS, RICHARD DOE DEVINE, RICHARD DOE BULLFRASS, JOHN C. NORRIS, WALT BUTLER, MIKE CASSIDY, PAUL J. O'FARRELL, JOHN W. SCHALLER, LOUIS D. WINE, MERLE ARMSTRONG, JOHN PHILIP MANTON and FRANCES JOHN GOOD,

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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I.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

ARTHUR L. BELL, INDIVIDUALLY, AND AS AN ASSOCIATE OF AND DIVISION SUPERINTENDENT OF "MANKIND UNITED," A VOLUNTARY ASSOCIATION, FOR AND IN BEHALF OF SAID "MANKIND UNITED" AND THE ASSOCIATES THEREOF; MAUDE ASKEW, EUGENE WADSWORTH BROWN, J. FRED BURKEY, LAWRENCE COOK, A. RAY ELSEA, JACOB GLOCKLER, BAY BURNS SHARP, SHANNA JAKEMAN, PAULINE KELSO, MAX THEODORE MILLER AND HOMER G. WILCOX,

Petitioners,

vs.

R. B. HOOD, THEODORE CRUISE, PHILIP BOWSER, GEORGE M. LANGDON, WILLIAM GIESON, EUGENE GREER, J. H. ANGELL, J. SECRIST, JOHN ROCHE, MALCOM C. POWRIE, CECIL C. HUMPHREYS, A. F. SCHEIMERHORN, WILLIAM BRANIGAN, JOHN DOE WOLFE, DON C. SWANSON, CARL B. SHERMAN, EARL K. ADAMS, HOWARD H. DAVIS, ROBERT T. PUGH, EDWARD A. FURBUSH, O. WILSON FARRELL, DENNIS G. SMITH, HERBERT J. NUBLISH, ROBERT O'KEEFE, EARL P. STATEN, ROBERT MONTGOMERY, NEWELL WILLIAMS, RICHARD DOE DEVINE, RICHARD DOE BULLFRASS, JOHN C. NORRIS, WALT BUTLER, MIKE CASSIDY, PAUL J. O'FARRELL, JOHN W. SCHAELER, LOUIS D. WINE, MERLE ARMSTRONG, JOHN PHILIP MANTON and FRANCES JOHN GOOD,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Supreme Court of the United States:

The petitioners respectfully allege:

A.

Summary Statement of the Matter Involved.

This petition brings to this Court for decision the question as to whether a United States District Court has jurisdiction in a suit for damages against federal officers, charged in a civil complaint to have violated the rights of the citizen to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment, and to be free from deprivation of liberty without due process of law by unlawful imprisonment, in violation of the Fifth Amendment.

The United States District Court for the Southern District of California ordered the petitioners' complaint dismissed, on its own motion, although no objection to the jurisdiction of the District Court, on the ground that the cause did not arise under the Constitution or laws of the United States,[1] was made by the defendants, appearing through the United States Attorney [R. I, 136, 149]. The Ninth Circuit Court of Appeals affirmed [R. II, 168, 169].

The complaint [R. I, 3-30] is thus aptly summarized by the Court of Appeals below [R. II, 168, 170]:

> "It is set out in the complaint that defendants, through the medium of unlawful and unreasonable searches and seizures, have violated the Fourth

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[1]Title 28, United States Code, Sec. 41 (1). The text of the section is set forth in the the Appendix.

Amendment to the personal injury of the several plaintiffs and that such defendants have invaded plaintiffs' immunities as provided by the Fifth Amendment to the effect that no person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *.' It is therefore alleged and argued by the plaintiffs that they have a right to recover personal judgments in the federal district court against the defendants involved for injuries sustained. . . .

"At the time of the alleged invasion of plaintiffs' rights each plaintiff stood indicted as of December 18, 1942, by a federal grand jury of violating Section 34, Title 50, U. S. C. A. No trial had been held.

"It is alleged that the defendants, on the day the indictment was returned, unlawfully conspired[2] with

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[2]The recitals of "conspiracy" in the complaint were unnecessary to state a cause of action against the defendants. These allegations may, and should be, deemed mere surplusage. In order that the "conspiracy" portions of the complaint might not becloud the issues in this case, and in an effort to prevent the Circuit Court below from positing its decision upon an irrelevant and spurious issue, the petitioners filed with the Clerk of the Circuit Court below a verified "Proposed Amended Complaint for Damages for False Imprisonment and Unlawful Search and Seizure by Federal Officers"; and also filed a Notice of Motion and a Motion that the Circuit Court order a reversal of the judgment of the District Court with instructions to said District Court to grant the appellants (Petitioners) leave of Court to file an Amended Complaint. The text of the "Proposed Amended Complaint" is set forth in Appendix "A", attached to said Motion. The proceedings in the Circuit Court upon the Notice of Motion and Motion appear in volume II of the Record, subsequent to page 180. The Circuit Court below denied the Motion [R. II, 178, 179.]

each other to act beyond their authority as said Federal Bureau of Investigation agents and police officers respectively, and agreed that they would abridge the Constitutional rights of the plaintiffs as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States to be free from the deprivation of liberty and property without due process of law, and to be free from unreasonable searches and seizures, and agreed unlawfully to simultaneously, in the early morning of December 18th, 1942, search the homes of the individual plaintiffs herein without any warrants of search or seizure, and unlawfully to seize the papers, documents and effects of said plaintiffs and of 'Mankind United', and falsely to imprison the individual plaintiffs by unlawfully arresting some of the individual plaintiffs without a warrant of arrest and unreasonably to delay the taking of all of the individual plaintiffs before a committing officer, in order to effectuate the unlawful searches and seizures aforesaid.'

"'That thereafter, and on the 18th day of December, 1942, as will appear more particularly hereinafter, the defendants and each of them, in order to carry out the terms and conditions of the illegal conspiracy aforesaid, and solely for the purpose of carrying out said terms and conditions, did arrest and imprison the individual plaintiffs herein, and did search the homes of said plaintiffs, and seize and carry away books, papers and effects of said individual plaintiffs and of said "Mankind United".'

"It is alleged that as to plaintiff Bell the following occurred. Defendants Cruise, Bowser, Langdon, Gieson Greer, and two named fictitiously broke doors of his residence, entered, and arrested Bell. The defendants had no search warrant or warrant of arrest. They searched the entire premises leaving them in confusion and disorder. They took Bell and held him for several hours away from the premises and did not take him before a magistrate. They took thousands of documents, papers, and records belonging to 'Mankind United', which were entrusted to Bell and took $8,500.00 in money. They took property belonging to Bell and his wife including safe deposit boxes. During a considerable period Bell was held incommunicado and not allowed to see his attorney who was just outside the door, and he was questioned. The allegations are to the effect that at about the same time all the other plaintiffs were subject to essentially the same illegal treatment, though in detail varying, by one or more of the defendants.

"It is apparent that each plaintiff personally seeks compensatory damages for alleged illegal arrest, false imprisonment, the forceable removal of his person from one place to another, the searching of his premises illegally and unreasonably, the seizing of property belonging to him and others, and the questioning without affording him the aid or advice of an attorney."

The Circuit Court below acknowledged that:

> *"There can be no question but that the complaint states strong cases and if the allegations have any foundation in truth, the plaintiffs'* (petitioners') legal *rights have been ruthlessly violated."* [R. II, 173].[3]

1. Opinions of the Court Below.

The opinion of the Circuit Court of Appeals below is as yet unreported. It appears in the Record at II, 168. The oral opinion of the District Judge is unreported. Its text is in the Record at I, 145.

2. Jurisdiction.

Jurisdiction of this Court is invoked under Judicial Code, Section 240 (a); 28 U. S. Code, Section 347 (a).

The judgment of the Circuit Court of Appeals below was entered on June 7, 1945 [R. II, 179].

Hence the Petition for Certiorari herein is timely.

3. Question Presented.

Has a United States District Court jurisdiction in a civil suit seeking damages against Federal officers, alleged to have violated, though an abuse of power,[4] rights secured by the Constitution?

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[3]The decision of the Circuit Court will be analyzed and criticized, *infra*, at p. 19.

[4]The phrase "abuse of power" is borrowed from Chief Justice Hughes in *Philadelphia Company v. Stimpson*, 223 U. S. 605, 619.

B.

Reasons Relied on for Allowance of the Writ.

1. *The Court below has decided an important question involving the jurisdiction of the United States District Courts, apparently never heretofore precisely determined by this Court.*

That a United States District (or Circuit) Court has jurisdiction in a suit for damages against federal officers acting in excess of their authority seems never heretofore to have been questioned in, or by, this Court. Indeed, such jurisdiction has been assumed by this Court in a line of cases beginning with *Little v. Barreme*, 2 Cranch 170 (1804)—a noteworthy decision written by Chief Justice Marshall upholding damages against a United States Naval officer in the sum of $8,504.00 for his unlawful seizure of a vessel. So in *Tracey v. Swartwout*, 10 Pet. 80 (1886), such jurisdiction was assumed. Again in *Mitchell v. Harmony*, 13 How. 115 (1851), a judgment of the United States Circuit Court was affirmed by this Court against military officers in the sum of $90,806.44, for unlawful seizure of private property.

In *Belknap v. Schild*, 161 U. S. 10 (1895), jurisdiction of a United States Circuit Court against a federal officer, in a suit for damages, was impliedly assumed by this Court when it reversed a judgment because the case was in equity, "without prejudice to an action at law against the defendants," presumably in a United States Circuit Court.

Another suit in a United States Circuit Court is *Cammeyer v. Newton*, 4 Otto (94 U. S.) 225 (1877).

No decision of this Court has assumed or intimated any lack of jurisdiction in the federal courts of original jurisdiction, to entertain a suit for damages against federal officers, alleged to have violated any federal constitutional right of any citizen.

2. *The Circuit Court below has decided an important question in conflict with applicable decisions of this Court.*[5]

The paucity of opinion by this Court upon the question at issue herein is compensated for by a recent decision by this Court on the general subject as to when a case "arises under the Constitution and laws of the United States," under Title 28, U. S. C., Section 41 (1) so that a United States District Court has jurisdiction over it.[6] That case is *Tunstall v. Brotherhood of Locomotive Firemen and Engineers*, 323 U. S. 210.

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[5]On the precise question as to whether a federal District Court has jurisdiction in a suit against federal officers seeking damages resulting from an alleged unreasonable search and seizure, there seems to be only one decision supporting the opinion of the Circuit Court below. It is by a United States District Court, *Taylor v. DeHart*, 22 Fed. (2d) 206 (D. C. Mo., 1926).

[6]This point is developed more fully in the supporting brief herein, *infra*, at pp. 13, 17.

Other decisions of this Court with which the judgment of the Court below seems to be in disaccord are *Gully v. First National Bank*, 299 U. S. 109; *Bock v. Perkins*, 139 U. S. 628; *Howard v. United States*, 184 U. S. 676; *U. S. ex rel. Rogers v. Conklin*, 68 U. S. 714; *Cohen v. Virginia*, 6 Wheat. 264, and *Osborn v. Bank of the United States*, 9 Wheat. 738.[7]

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[7]Still other decisions of this Court seem to have been ignored by the Circuit Court below. They sustain the jurisdiction of a federal Court to accord relief against federal officers acting in abuse of power, on the equity side of the Court's process. They are: *Philadelphia Company v. Stimpson*, 223 U. S. 605; *Goltra v. Weeks*, 271 U. S. 536 and others. It would seem that it can make no difference whether the suit against a public officer for "abuse of power" is for damages resulting from an abuse committed, or is for an injunction to restrain an abuse threatened; for Title 28, U. S. C. A., Sec. 41 (1) confers jurisdiction upon the United States District Courts:

> "where the matter in controversy . . . . arises under the Constitution or laws of the United States . . . . of *all* suits of a civil nature at *common law or equity*." (Italics ours.)

The heart of the question is whether a federal right is in issue: if the federal right is threatened by a federal officer acting beyond his authority, the citizen's remedy is by injunction, on the equity side of the federal court; if the federal right has been abridged, the remaining judicial remedy against the federal officer is by an action for damages, on the law side of the federal court.

Conclusion.

Wherefore, your petitioners pray that this Court issue a Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit; and that thereupon the judgment of said Circuit Court of Appeals affirming the judgment of the District Court below be set aside.

ARTHUR L. BELL, individually, and as an Associate of and Division Superintendent of "Mankind United," a Voluntary Association, for and in behalf of said "Mankind United" and The Associates thereof: MAUDE ASKEW, EUGENE WADSWORTH BROWN, J. FRED BURKEY, LAWRENCE COOK, A. RAY ELSEA, JACOB GLOECKLER, BAY BURNS SHARP, SHANNA JAKEMAN, PAULINE KELSO, MAX THEODORE MILLER and HOMER G. WILCOX,

Petitioners.

By A. L. WIRIN and RUSSELL E. PARSONS,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

ARTHUR L. BELL, INDIVIDUALLY, AND AS AN ASSOCIATE OF AND DIVISION SUPERINTENDENT OF "MANKIND UNITED," A VOLUNTARY ASSOCIATION, FOR AND IN BEHALF OF SAID "MANKIND UNITED" AND THE ASSOCIATES THEREOF; MAUDE ASKEW, EUGENE WADSWORTH BROWN, J. FRED BURKEY, LAWRENCE COOK, A. RAY ELSEA, JACOB GLOCKLER, BAY BURNS SHARP, SHANNA JAKEMAN, PAULINE KELSO, MAX THEODORE MILLER AND HOMER G. WILCOX,

Petitioners,

vs.

R. B. HOOD, THEODORE CRUISE, PHILIP BOWSER, GEORGE M. LANGDON, WILLIAM GIESON, EUGENE GREER, J. H. ANGELL, J. SECRIST, JOHN ROCHE, MALCOM C. POWRIE, CECIL C. HUMPHREYS, A. F. SCHEIMERHORN, WILLIAM BRANIGAN, JOHN DOE WOLFE, DON C. SWANSON, CARL B. SHERMAN, EARL K. ADAMS, HOWARD H. DAVIS, ROBERT T. PUGH, EDWARD A. FURBUSH, O. WILSON FARRELL, DENNIS G. SMITH, HERBERT J. NUBLISH, ROBERT O'KEEFE, EARL P. STATEN, ROBERT MONTGOMERY, NEWELL WILLIAMS, RICHARD DOE DEVINE, RICHARD DOE BULLFRASS, JOHN C. NORRIS, WALT BUTLER, MIKE CASSIDY, PAUL J. O'FARRELL, JOHN W. SCHALLER, LOUIS D. WINE, MERLE ARMSTRONG, JOHN PHILIP MANTON and FRANCES JOHN GOOD,

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

For a statement showing the opinions of the Courts below, the basis on which the jurisdiction of this Court is claimed, the questions presented, and a statement of the case, reference is here made to the foregoing Petition for Writ of Certiorari.

Specifications of Errors.

The judgment of the Circuit Court of Appeals is contrary to law in that:

I.

The United States District Court had jurisdiction over the petitioners' cause of action against the defendants, agents of the Federal Bureau of Investigation—said cause of action being an action for damages resulting from alleged unlawful searches and seizures, in violation of the Fourth Amendment, and from alleged false imprisonment in violation of the Fifth Amendment.

II.

The Circuit Court below erred in denying the petitioners' Motion to Reverse Judgment, and in refusing to instruct the United States District Court below to grant leave to the petitioners to file an amended complaint.

ARGUMENT.

I.

The United States District Court Had Jurisdiction Over the Petitioners' Cause of Action Against the Defendants—Agents of the Federal Bureau of Investigation—Said Cause of Action Being an Action for Damages Resulting From Alleged Unlawful Searches and Seizures, in Violation of the Fourth Amendment, and From Alleged False Imprisonment in Violation of the Fifth Amendment.*

The petitioners' cause of action would seem to meet the requirements as to original federal jurisdiction first enunciated by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. (19 U. S.) 264, 378:

> "A case in law or equity . . . may truly be said to arise under the constitution or a law of the United

*The jurisdiction of the District Court is thus stated in the original complaint [R. I. 3]:

> "Jurisdiction of this Court is founded upon a Federal question arising under the Fourth and Fifth Amendments to the Constitution of the United States, and Title 5, U. S. Code, Sections 300a[1] as fully appears hereinafter. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00). Jurisdiction of this Court is founded upon the Federal question involving the rights of the individual plaintiffs and each of them to be free from deprivation of liberty without due process of law by false and unlawful imprisonment; and the Constitutional rights of all of the plaintiffs to be free from unreasonable searches and seizures. All of the persons who participated in the acts to be hereinafter complained of, with the exception of the defendant Merle Armstrong, were at the time of the commission of said acts, and at all times herein have been, officers of the Federal Government, to-wit, Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice, and claim to have acted under and by virtue of the Provisions of Sections 300 and 300a of Title 5, U. S. Code aforesaid, and

[1] 5 U. S. C., Sec. 300 and Sec. 300a are set forth in the Appendix herein.

States, whenever its correct decision depends upon the construction of either."

In the case at bar the correct decision of the case depends upon the construction to be given by the federal courts to the Fourth and Fifth Amendments to the United States Constitution and to Title 5, Sections 300, 300a, of the U. S. Code.

The complaint, to put the case somewhat differently, discloses federal jurisdiction because its allegations come within the tests of federal jurisdiction as outlined by Jus-

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have acted in concert as is more particularly set forth hereinafter."

The jurisdiction of the District Court is set forth more fully and more carefully in the verified "Proposed Amended Complaint" submitted to the Court of Appeals below, as follows:

"Jurisdiction of this Court is founded upon a Federal question arising under the Fourth and Fifth Amendments to the Constitution of the United States; and Title 5, U. S. Code, Sections 300 and 300a, as more fully appears hereinafter. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000.00). Jurisdiction of this Court is founded upon the Federal question involving the rights of the individual plaintiffs and each of them to be free from deprivation of liberty without due process of law by false and unlawful imprisonment in violation of the Fifth Amendment to the Constitution; and the rights of all of the plaintiffs to be free from unreasonable searches and seizures, in violation of the Fourth Amendment. All of the defendants at all times herein were and are officers of the Federal Government, to-wit, Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice, and claim to have acted under and by virtue of the provisions of, and under the authority of Section 300 and 300a of Title 5, U. S. Code aforesaid, and as said federal officers, and, within the scope of their authority as said federal officers, and solely because of said authority, and as said officers.

"Said defendants and each of them, however, abused their power and authority as said federal officers, and as said

tice Cardozo in *Gully v. First National Bank*, 299 U. S. 109. As Justice Cardozo put it (at p. 112):

"How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."

". . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction *or* effect, 'and defeated if they receive another.' . . . A

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agents of the Federal Bureau of Investigation, as will appear more particularly hereinafter.

"The District Court of the United States for the Southern District of California has jurisdiction in the premises, more particularly, in that it is a suit of a civil nature arising under the Constitution and the laws of the United States, in the following respects:

"The construction or effect of the following constitutional and statutory provisions is in issue:

"A. Constitutional Provisions.

1. Whether or not the searches and seizures by the defendants hereinbelow complained of were unreasonable, in violation of the Fourth Amendment.

2. Whether or not the imprisonment of the plaintiffs by the defendants to be hereinbelow set forth, deprived the plaintiffs of liberty without due process of law, in violation of the Fifth Amendment.

"B. Statutory Provisions.

1. Whether or not either or both the searches and seizures by the defendants, and the imprisonment of the plaintiffs by the defendants, violated the rights of the plaintiffs conferred upon them by Title 5, U. S. Code, Sections 300 and 300a, by violating the limitations of power imposed upon said defendants by said laws."

[Appendix "A" attached to Motion to Reverse Judgment, printed following p. 180 of Vol. II of the Record herein, pp. 12, 13.]

> genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto, . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." (Italics ours.)

If the scope of Articles IV and V of the Bill of Rights and Title 5, U. S. Code, Sections 300 and 300a, are given a construction or effect by the federal courts favorable to the petitioners, the petitioners' rights will be supported and they will be entitled to prevail; if, on the other hand, the federal courts give these same provisions of the Federal Constitution and these same federal statutes a different construction or effect, adverse to the petitioners and favorable to the defendants, the petitioners' claims will be defeated.

Hence the complaint raises a substantial controversy as to the scope, meaning or effect of provisions of the Federal Constitution, and requires the federal courts to pass upon, construe, interpret and apply additionally, certain particular federal statutes. A consideration and interpretation of these federal statutes, as well as the provisions of the Fourth and Fifth Amendments to the Constitution by the District Court, was necessary, indispensable and inescapable. The controversy between the petitioners and the defendants as to meaning, scope and effect of the constitutional provisions and the federal statutes referred to is substantial, direct, genuine, and is disclosed affirmatively and completely in the complaint itself.

Moreover, in the instant case, the search alleged to have been carried out by the defendants is asserted to be "unreasonable" within the proscriptions of the Fourth Amendment. The complaint accordingly called for a construction by the federal Courts, including the District Court below, as to the meaning and application of the phrase "unreasonable"—a construction which could have been made adequately by the District Court below only after a hearing on the merits, and not by the District Court's summary dismissal of the complaint.

Where the construction of a phrase in a federal statute is required, the cause may be deemed to "arise" under a law of the United States, within the meaning of 28 U. S. C., Sec. 41 (1). This would seem to be the import of the *Tunstall* decision by this Court. There this Court ruled that a federal District Court had jurisdiction because called upon to construe and apply the phrase "representative" in the Railway Labor Act; here the District Court was called upon to construe and apply the phrase "unreasonable" in the Fourth Amendment.

Said the Chief Justice, for this Court, in the *Tunstall* case:

> "We also hold that the right asserted by petitioners which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. The extent and nature of

> the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted.' "[9]

On the facts, it might be claimed that the instant case is stronger than *Tunstall's* case: for in the latter, the suit was for damages (and injunction) against private parties; here it is for damages against federal officers, who claim to have acted as such and under their authority as such officers.

In any event, the language of this Court in the *Tunstall* decision may be thus paraphrased to apply to the instant case:

The rights asserted by the petitioners are derived from the guarantees of the Fourth and Fifth Amendments; and arise from a duty imposed by these Articles of the Bill of Rights, upon the defendants, as law enforcement officers, not to abridge those guarantees. These rights of the petitioners are expressed in the Constitution; and the duty imposed upon the defendants not to abridge them, is implied from the Constitution. It is the federal Constitu-

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[9] The Department of Justice, in a brief *amicus curiae* filed in the *Tunstall* case thus stated the applicable law:

> "The cause of action in the *Tunstall* case thus 'Clearly has its origin (in) and is controlled by the Railway Labor Act, and this is sufficient."

"We paraphrase the language of the Department of Justice as applied to the instant case: The cause of action of the petitioners thus clearly has its origin in, and is controlled by, the Fourth and Fifth Amendments; and this is sufficient.

tion that condemns the conduct of the defendants complained of in the petitioners' complaint as unlawful. And, finally, the extent, nature, and legal consequences of the Constitutional condemnation of the Fourth and Fifth Amendments, though left to judicial determination, are nevertheless to be derived from those Amendments, and from the federal policy they have adopted. The petitioners' case is therefor one arising under the federal Constitution.

Furthermore, the cases which sustain the jurisdiction of federal District Courts in suits for damages against federal officers, involving the construction or effect of process or of bonds, are not to be distinguished away. They are *Bock v. Perkins*, 139 U. S. 628; *Howard v. United States*, 184 U. S. 676 and *U. S. ex rel. Rogers v. Conklin*, 1 Wall. (68 U. S.) 714. Surely if there is jurisdiction in the federal courts, in suits against federal officers for damages, under process or instruments authorized by a federal statute, there must then more certainly be jurisdiction, where the suit arises out of the federal statute (or the Constitution)[10] directly.

The decision of the Circuit Court below analyzed.

The decision of the Circuit Court finds strict legal support in only one court decision—that of a United States District Court. *Taylor v. DeHart*, 22 Fed. (2d) 206 (D. C. Mo.) is the only reported decision holding that suit against federal officers for damages resulting from unlaw-

[10]The source of all federal statutes.

ful search and seizure may not be prosecuted in a federal District Court.

2. The Circuit Court accepts in principle decisions of this Court [R. 11, 174], *Cohen v. Virginia*, 19 Wheat. 264; *Osborn v. Bank of the United States*, 9 Wheat. 738, but fails to apply the law of these cases to the instant case.

3. The Court below seeks to distinguish the *Tunstall* case, because the latter arose under a law regulating commerce.

But the particular federal statute under which a cause of action arises can make no difference. Title 28, Sec. 41 (1) gives no priority to any federal law.[11]

28 U. S. Code, Sec. 41 (8) is comparable to 28 U. S. Code, Sec. 41 (1). Section 41 (8) confers original jurisdiction on the United States District Courts in suits "*arising* under law regulating commerce; Sec. 41 (1) confers such jurisdiction where a suit '*arises* under the Constitution or laws of the United States.'" (Italics supplied.) Whether or not a suit thus "arises" poses the same question of law, and of statutory construction.

The only difference between the two sub-sections is that Sec. 8 contains no minimum monetary requirement. That the instant complaint discloses a controversy exceeding the sum of $3000 is not questioned. (Compare the statement of

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[11]So far as jurisdiction of the federal District Courts are concerned, the Constitution is on a par with federal statutes. *Cf.* 28 U. S. C., Sec. 41 (1).

the Circuit Court below: "The damages prayed for far exceed the jurisdiction requirements as to value in controversy." [R. II, 169].)

4. Insofar as the Circuit Court below relies heavily, in its reasoning, on the "conspiracy" allegations in the original complaint [as for example at R. II, 174, 171], its decision is wanting in support, in view of the "Proposed Amended Complaint" which the petitioners sought permission to file in the District Court, in which Amended Complaint all conspiracy recitals are omitted [p. 12 of Appendix "A" attached to Motion to Remand Cause, appearing following p. 180 of Vol. II of the Record herein].

The Circuit Court proffers no reason for its refusal to remand the cause to the District Court to afford the petitioners an opportunity to file an Amended Complaint omitting all the conspiracy features of the original complaint. [R. II, 178.]

The "Proposed Amended Complaint" outlined in specific detail the constitutional and statutory provisions, the construction or effect of which are put in issue by the Amended Complaint, as follows:

"A. Constitutional Provisions.

1. Whether or not the searches and seizures by the defendants hereinbelow complained of were unreasonable, in violation of the 4th Amendment.

2. Whether or not the imprisonment of the plaintiffs by the defendants to be hereinbelow set forth, deprived the plaintiffs of liberty without due process of law, in violation of the 5th Amendment.

"B. Statutory Provisions.

1. Whether or not either or both the searches and seizures by the defendants, and the imprisonment of the plaintiffs by the defendants, violated the rights of the plaintiffs conferred upon them by Title 5, U. S. Code, Sections 300 and 300a, by violating the limitations of power imposed upon said defendants by said laws." [Appendix "A," p. 13, attached to Motion to Reverse Judgment, appearing in Vol. II of Record following p. 180.]

The complete text of the jurisdictional allegations both in the original complaint and the proposed amended complaint are set forth in footnote 8, at p. 13, *supra*.

Conclusion.

The defendants have authority, power and prestige on their side; the petitioners are associates of a minority group, at the moment convicted of "sedition"[12]—the victims, they believe, of wartime prejudice and passions.

But the defendants, no matter their power or prestige, are not above the law; and the petitioners no matter their guilt or innocence, are not outside the pale of constitutional protection.

Under our form of government, the only remaining governmental agency with the authority and duty to bring the defendants to account at the bar of justice on the one hand, and to accord to the petitioners, on the other hand, the reality of constitutional right—is the courts.

The District Court below had ample jurisdiction so to do.

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[12]Their appeal from the conviction is now pending before the Ninth Circuit Court of Appeals, *Bell v. United States*, No. 10432, 9 C. C. A.

What is there in law, in reason, and in common fair dealing[13] to prevent this Court from so ruling?

Said Justice Cardozo in the *Gully* case (299 U. S. 109, 117):

> "What is needed (in determining whether a case arises under the Constitution or law of the United States) is something of that common sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation."

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[13]To the petitioners, the effect of an action by this Court, relegating them to pursue their cause in the state courts, will be more than an academic ruling on the appropriate forum to assert their claims. A cause of action for illegal abridgement of personal rights is barred by California law, by a one year Statute of Limitations. (California Code of Civil Procedure, Sec. 340.) This statutory period had elapsed prior to the ruling of the District Court below. The alleged unreasonable searches and seizures took place on December 18, 1942. The instant complaint was filed seasonably in the United States District Court below on April 7, 1943 [R. I, 39]. The District Court did not order the complaint dismissed of its own motion until *March 20, 1944*, when the California one year Statute of Limitations had run. Upon the filing of a suit in the Superior Court of Los Angeles County, subsequent to the District Court's ruling, the petitioners herein were met with a demurrer urging the one year Statute of Limitations. The Los Angeles Superior Court sustained the demurrer, so far as the cause of action in the State Court involved abridgment of personal rights. *Bell v. Adams*, Los Angeles Superior Court, No. 492469.

Said the Solicitor General of the United States in the Department of Justice's brief in the *Tunstall* case (Brief *Amicus Curiae*, p. 42):

> "Obviously the enforcement of duties created by the Federal Act (the Railway Labor Act) should not be left exclusively to the State Courts."

Just as obviously, common sense calls for a ruling from this Court that the federal District Court below had jurisdiction of this cause. Is it "common-sense" to shut the

doors of the *federal* courts to the citizen when his complaint is that a *federal* official, acted under color of *federal* authority, but in excess of *federal* power, and in violation of his *federal* rights?[14]

The petition for certiorari should accordingly be granted; and the judgment of the Court of Appeals below be reversed. In the alternative, the order of the Cir-

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[14]The instant cause poses the problem of comity between the federal and state courts in reverse of the phase in issue in *Watson v. Buck*, 313 U. S. 387; *Douglas v. Jeanette*, 319 U. S. 157, and companion cases. Here we have no congressional policy leaving primary jurisdiction to state tribunals. On the contrary congressional policy is to the effect that the United States District Court shall have primary jurisdiction over violation by federal officers of the Fourth Amendment.

Cf. Lefkowitz v. United States, 285 U. S. 452, upholding the jurisdiction of the federal courts to order the return of papers illegally seized, without a search warrant. *Cf.* 18 U. S. C., Sec. 626, conferring jurisdiction on the federal courts to order the return of documents illegally seized, under a search warrant. See, also, 18 U. S. C., Sec. 53a and Sec. 631 conferring jurisdiction on the federal courts for the prosecution of federal officers for illegal searches, without, and with, respectively, search warrants.

It seems passing strange, accordingly, that a controversy involving the conduct of federal officers should be relegated to the state courts for airing and arbitrament. Common sense and logic would seem to suggest that the appropriate forum for misconduct by state officers should originally be the state courts; and, contrariwise, misconduct by federal officers should be passed upon by the federal courts.

The reluctance which this Court has shown in removing from the state courts original jurisdiction to determine the ambit of state problems, should be applied equally by the exercise of federal judicial self-restraint in thrusting upon the state courts, the burdens of airing controversies involving the misconduct of federal officers.

In the instant case the federal nature of the controversy is further seen from the fact that the federal government through the United States Department of Justice has defended the cause at all stage of the proceedings. Thus the defendants appeared by the United States Attorney for the Southern District of California in the trial court. [R. I, 31-32.] Similarly, the United States Attorney represented the defendants in the Circuit Court below. [R. I, 163.]

In this Court it is anticipated that the defendants will appear by the Solicitor General (cf. Rule 38 (3) of this Court).

cuit Court below denying the petitioners' Motion to Reverse Judgment with instructions to grant leave to file an amended complaint should be reversed.

Respectfully submitted,

A. L. WIRIN,

RUSSELL E. PARSONS,

By A. L. WIRIN,

Counsel for Petitioners.

APPENDIX.

Title 28, Section 41. (Judicial Code, Section 24., amended.) Original jurisdiction.—The district courts shall have original jurisdiction as follows:

(1) "*United States as plaintiff, civil suits at common law or in equity.*—First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects."

Title 5, U. S. Code, Section 300.

"*Officials for detection and prosecution of crime.*—For the detection and prosecution of crimes against the United States, and for the acquisition, collection, classification, and preservation of criminal identification records and their exchange with the officials of States, cities, and other institutions, the Attorney General is authorized to appoint officials who shall be vested with the authority necessary for the execution of such duties."

Title 5, U. S. Code, Section 300a.

"*Director, assistant directors, agents, and inspectors of division of investigation empowered to serve*

process, make arrests.—The Director, Assistant Directors, agents, and inspectors of the Division of Investigation of the Department of Justice are empowered to serve warrants and subpoenas issued under the authority of the United States; to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer. Such members of the Division of Investigation of the Department of Justice are authorized and empowered to carry firearms."

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IN THE

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OCTOBER TERM, 1945.
No. 344.

ARTHUR L. BELL *et al.*,

Petitioners,

vs.

R. B. HOOD *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

I. Petitioners' Reply to Respondents' Statement.

1. The respondents' statement is posited largely, not on the allegations contained in the petitioners' complaint which, the trial court ruled, failed to disclose jurisdiction [R. 151], but on affidavits and counter-affidavits submitted to the trial court in connection with a motion for summary judgment made by the respondents [R. 42]. These affidavits, and the portions of the respondents' statement relying upon the affidavits, should be ignored by this Court for the following reasons:

(a) Neither the District Court [R. 151] nor the Circuit Court below [R. II, 168] based their ruling upon the

affidavits. Their decisions were arrived at solely upon a consideration of the recitals contained in the complaint, which complaint the courts below respectively ruled did not state a cause of action conferring jurisdiction upon the trial court. No reference is made by either court below to the affidavits as the basis for their decisions. Cf. Opinion of District Court [R. 145]; Opinion of Circuit Court [R. II, 168].

(b) The evidence submitted by the respondents, in support of their motion for summary judgment, constituted *defensive* material, which, under the respondents' own theory, may not be considered in determining the jurisdiction of the District Court.

Accordingly, this Court should ignore all portions of the respondents' statement relying upon factual material appearing in the Record, other than those set forth in the petitioners' complaint.[1] Accordingly, if this Court limits itself to an appraisal of the import of the recitals in the petitioners' complaint, it will readily find itself in accord with the observation of the Circuit Court below that "There can be no question but that the complaint states strong cases, and if the allegations have any foundation in truth, *the plaintiffs' legal rights have been ruthlessly violated.*" [R. II, 173.] (Italics ours.)

2. The references in the respondents' "statement" to the ruling of the trial court in the case of *Bell v. United States*, now pending on appeal in the Ninth Circuit Court

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[1]The petitioners' complaint appears in the Record at pp. 2-30; all page references in the Respondents' Brief from pp. 34-134 are references to affidavits and counter-affidavits; these should not be considered by this Court.

of Appeals (*Bell v. United States*, No. 10432) on the occasion of the trial of the petitioners on criminal charges, are similarly out of place in the instant proceedings. The trial court below rejected the respondents' contention that the ruling of the trial judge in the criminal case was *res judicata* in the instant case [R. 157]. From this ruling the respondents have neither taken nor prosecuted any appeal.[2]

The petitioners charged with "sedition," claim to be the victims of a political persecution. The constitutional guarantee against unlawful searches and seizures demands the more scrupulous protection at the hands of the courts where, as claimed by the petitioners, such searches are "used by a government determined to suppress political opposition under the guise of sedition." (Judge Hand in *U. S. v. Kirschenblatt* (C. C. A. 2), 16 Fed. (2d) 202, 203.)[3]

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[2]The reason for the respondents' venturing into fields *de hors* the Record in this case is not clear—at least not patent.

Nor does the relevancy of the respondents' reference to the petitioners' conviction upon charges of conspiracy to commit "sedition" appear, for this Court has ruled often enough that the constitutional guarantee against unreasonable searches and seizures protect the guilty as well as the innocent.

> "The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. . . . Its protection extends to offenders as to the law abiding," *U. S. v. Lefkowitz*, 285 U. S. 452, 464.

[3]Cf. in accord Zechariah Chafee, Jr. in "Freedom of Speech in the United States," at p. 242, dealing with the experiences of John Wilkes.

II. Reply to Respondents' Argument.

1. The right of the petitioners to sue is *not* derived from local or common law, exclusively, as suggested by the respondents. By virtue of the express guarantees of the Fourth Amendment, the right to be free from unreasonable searches and seizures, formerly a general right arising out of general or common law, became a specific federal constitutional right expressly protected by the federal Constitution. It is for the vindication of that expressly vouchsafed federal constitutional right, that the petitioners filed their complaint in the federal District Court below. That the common law buttresses their rights, does not undermine its federal constitutional support.

2. So far as jurisdiction of a United States District Court is concerned, there can be no valid distinction, as asserted by the respondents, between a suit for an injunction and a suit for damages against federal officers, where the issue is whether the officers have acted in excess of their power. If the citizen, deprived of federal constitutional right by threats of actions by federal officers in excess of their authority deem injunctive relief adequate, the equity side of the federal court, it is conceded by the respondents, is open to him. (Cf. *Philadelphia Co. v. Stimpson*, 223 U. S. 605.) If the illegal action by federal officers has been consummated, why should there not be jurisdiction in the federal court to award damages to the aggrieved citizen, in a case where damages are otherwise appropriate.[4]

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[4]Cf. our discussion of this point in our Petition, p. 9, Note 7.

We see no basis for the respondents' *ipse dixit* assertion that a suit for damages is "one for substituted or secondary redress" (and we don't understand what that means!).

More often than not, the only adequate recourse for the vindication of abridged constitutional rights is by way of a suit for damages.

3. In *Tunstall v. Brotherhood*, 323 U. S. 721, the latest decision by this Court upon the general subject in issues herein (and heavily relied upon in our Petition) the respondents make only the following casual mention:

> "*Tunstall v. Brotherhood*, 323 U. S. 721, arose under a law regulating commerce, the Railway Labor Act, which created rights in favor of the class of which the plaintiff was a member."

To phrase the respondents' treatment of the *Tunstall* case, we say that the instant complaint was filed to secure redress, by way of damages, for the abridgment of the Fourth Amendment "which created rights in favor of" all classes of persons in the United States, including the petitioners.

4. The respondents' assertion that:

> ". . . there was no disputed question (in the courts below) as to the construction or effect of any constitutional provision or federal statute, and that the sole issue was whether the respondents, not questioning or denying petitioners' legal rights . . ."

impinged upon the petitioners' rights is not supported by the Record. On the contrary, the respondents have, in the District Court below, challenged, in effect, the scope and meaning of the Fourth Amendment, asserting in their motion to dismiss [R. 146] that the searches and seizures abridged "no rights under the Constitution of the United States."

Thus, the major issue, as joined in by the respondents, in the instant case is whether, as properly (and, we believe, broadly) construed the Fourth Amendment prescribes the conduct by government officers complained of—an issue inevitably requiring a construction of the meaning and scope of the Fourth Amendment, and, particularly, the phrase in the Amendment, "unreasonable."

Conclusion.

We dissent from the assertion of the respondents that the petitioners may secure adequate vindication of their rights by way of their motions to suppress the evidence, claimed by them to have been illegally seized, in the criminal prosecution against them, now on appeal.

Surely, the citizen should not be required to wait until he is prosecuted for crime, before he may have recourse in the federal courts to protest an unreasonable search and seizure. Were that the law, the "lawless" law-enforcement officer would be encouraged to evade criminal prosecution, in the more flagrant violations of the guarantees against unreasonable searches and seizures, in order to

avoid judicial reprimand. And thus the guilty citizen would go unpunished, along with the lawless official.

Nor does the existence of federal criminal penalties for unlawful searches and seizures (18 U. S. Code, Sec. 53a) afford adequate redress. The instant case is evidence in point. Instead of prosecuting the respondents, Government counsel, low and high have entered the lists supporting the defense of the respondents, rather than protecting the rights of the petitioners. Thus the United States Attorney, in the courts below at government's expense, has appeared in behalf of the respondents; the Solicitor General of the United States similarly appears in their behalf in this Court. If successful, the effect of their aid will be that not only will the respondents not have been prosecuted for a violation of the federal statute imposing penal sanctions for unlawful searches and seizures, but they will be immunized from civil liability for the unlawful arrest and imprisonment of the petitioners, by virtue of the lapse of the California Statute of Limitations.[5]

That the only substantial deterrent to the "lawless enforcement of the law" and to public officers so disposed is the prospect of civil suits for damages for lawless official conduct, seems to be the lesson of experience.

Only by keeping the doors of the Federal District Courts wide open to citizen suitors seeking a vindication of their

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[5]California Code of Civil Procedure, Sec. 340. Cf. our discussion in our Petition, p. 23, footnote 13.

constitutional rights against federal officers who have violated them—whether the suit is for injuction or for damages—can we square our domestic judicial policy with our international judicial policy towards international lawlessness.[6]

Respectfully submitted.

RUSSELL E. PARSONS,
A. L. WIRIN,
Counsel for Petitioners.

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[6]In opposing a weak international policy on international official lawlessness, Justice Robert H. Jackson, as Chief of Counsel for the United States in the prosecution of Axis War Criminals explained that such a policy should in any event not be "inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded."

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BRIEF FOR PETITIONERS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 344

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Petitioners,

vs.

R. B. HOOD, *et al.*,

BRIEF FOR PETITIONERS.

Jurisdiction.

Jurisdiction of this Court is invoked under Judicial Code, Section 240 (a); 28 U. S. Code, Section 347 (a).

The judgment of the Circuit Court of Appeals below was entered on June 7, 1945 [R. 11, 179]; this Court granted certiorari on October 22, 1945.

Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals below is reported at 150 Fed. (2d) 96. It appears in the Record at 168. The oral opinion of the District Judge is unreported. Its text is in the Record at 145.

Question Presented.

Has a United States District Court jurisdiction in a civil suit seeking damages against Federal officers alleged

to have violated, through an abuse of power[1] rights secured by the Constitution?

Statement of the Case.

This petition brings to this Court for decision the question as to whether a United States District Court has jurisdiction in a suit for damages against federal officers, charged in a civil complaint to have violated the rights of the citizen to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment, and to be free from deprivation of liberty without due process of law by unlawful imprisonment, in violation of the Fifth Amendment.

The United States District Court for the Southern District of California ordered the petitioners' complaint dismissed, of its own motion, although no objection to the jurisdiction of the District Court, on the ground that the cause did not arise under the Constitution or laws of the United States,[2] was made by the defendants, appearing through the United States Attorney [R. 136, 149]. The Ninth Circuit Court of Appeals affirmed [R. 168, 169].

The complaint [R. 3-30], is thus aptly summarized by the Court of Appeals below [R. 168, 170]:

> "It is set out in the complaint that defendants, through the medium of unlawful and unreasonable searches and seizures, have violated the Fourth

---

[1]The phrase "abuse of power" is borrowed from Chief Justice Hughes in *Philadelphia Company v. Stimpson*, 223 U. S. 605, 619. There this Court ruled that the federal courts have jurisdiction over federal officers to enjoin threatened action that is in "abuse of power."

[2]As required by Title 28, United States Code, Sec. 41 (1). The text of the section is set forth in the Appendix.

Amendment to the personal injury of the several plaintiffs and that such defendants have invaded plaintiffs' immunities as provided by the Fifth Amendment to the effect that no person '* * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law: * * *.' It is therefore alleged and argued by the plaintiffs that they have a right to recover personal judgment in the federal district court against the defendants involved for injuries sustained. . . . each plaintiff stood indicted as of December 18, 1942, by a federal grand jury of violating Section 34, Title 50, U. S. C. A. No trial had been held.

"It is alleged that the defendants, on the day the indictment was returned, 'unlawfully conspired'[3] with each other to act beyond their authority as said Federal Bureau of Investigation agents and police officers respectively, and agreed that they would abridge the Constitutional rights of the plaintiffs as guaranteed by the Fourth and Fifth Amendments to the Consti-

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[3]The recitals of "conspiracy" in the complaint were unnecessary to state a cause of action against the defendants. These allegations may, and should be, deemed mere surplusage. In order that the "conspiracy" portions of the complaint might not becloud the issues in this case, and in an effort to prevent the Circuit Court below from positing its decision upon an irrelevant and spurious issue, the petitioners filed with the Clerk of the Circuit Court below a verified "Proposed Amended Complaint for Damages for False Imprisonment and Unlawful Search and Seizure by Federal Officers"; and also filed a Notice of Motion and a motion that the Circuit Court order a reversal of the judgment of the District Court with instructions to said District Court to grant the appellants (petitioners) leave of court to file an Amended Complaint. The text of the "Proposed Amended Complaint" is set forth in Appendix "A," attached to said Motion. The proceedings in the Circuit Court upon the Notice of Motion and Motion appear in the Record, subsequent to page 180. The Circuit Court below denied the Motion [R. 178, 179] without comment.

tution of the United States to be free from the deprivation of liberty and property without due process of law, and to be free from unreasonable searches and seizures, and agreed unlawfully to simultaneously, in the early morning of December 18th, 1942, search the homes of the individual plaintiffs herein without any warrants of search or seizure, and unlawfully to seize the papers, documents and effects of said plaintiffs and of 'Mankind United', and falsely to imprison the individual plaintiffs by unlawfully arresting some of the individual plaintiffs without a warrant of arrest and unreasonably to delay the taking of all of the individual plaintiffs before a committing officer, in order to effectuate the unlawful searches and seizures aforesaid.'

"'That thereafter, and on the 18th day of December, 1942, as will appear more particularly hereinafter, the defendants and each of them, in order to carry out the terms and conditions of the illegal conspiracy aforesaid, and solely for the purpose of carrying out said terms and conditions, did arrest and imprison the individual plaintiffs herein, and did search the homes of said plaintiffs, and seize and carry away books, papers and effects of said individual plaintiffs and of said "Mankind United".'

"It is alleged that as to plaintiff Bell the following occurred. Defendants Cruise, Bowser, Langdon, Gieson, Greer, and two named fictitiously broke doors of his residence, entered, and arrested Bell. The defendants had no search warrant or warrant of arrest. They searched the entire premises leaving them in

confusion and disorder. They took Bell and held him for several hours away from the premises and did not take him before a magistrate. They took thousands of documents, papers, and records belonging to 'Mankind United', which were entrusted to Bell and took $8,500.00 in money. They took property belonging to Bell and his wife including safe deposit boxes. During a considerable period Bell was held incommunicado and not allowed to see his attorney who was just outside the door, and he was questioned. The allegations are to the effect that at about the same time all the other plaintiffs were subject to essentially the same illegal treatment, though in detail varying, by one or more of the defendants.

"It is apparent that each plaintiff personally seeks compensatory damages for alleged illegal arrest, false imprisonment, the forceable removal of his person from one place to another, the searching of his premises illegally and unreasonably, the seizing of property belonging to him and others, and the questioning without affording him the aid or advice of an attorney."

The Circuit Court[4] below acknowledged that:

"There can be no question but that the complaint states strong cases and if the allegations have any foundation in truth; the plaintiffs' (petitioners') legal rights have been ruthlessly violated." [R. 173.][5]

---

[4]The decision of the Circuit Court will be analyzed and criticized, *infra*, at pp. 15-17.

[5]All italics supplied.

Summarized differently, the complaint charges that the defendants, FBI agents, "acted in excess of their actual authority, but in the course of their employment and in furtherance of the official purposes of the bureau they serve" in abridging the petitioners' federal constitutional rights.

This is the version of the Northern and Southern California branches of the American Civil Liberties Union, in their *amici curiae* brief, on file herein, which we accept.

Specifications of Errors.

The Judgment of the Circuit Court of Appeals is contrary to law in that:

I.

The United States District Court had jurisdiction over the petitioners' cause of action against the defendants—agents of the Federal Bureau of Investigation—said cause of action being an action for damages resulting from alleged unlawful searches and seizures, in violation of the Fourth Amendment, and from alleged false imprisonment in violation of the Fifth Amendment.

II.

The Circuit Court below erred in denying the petitioners' Motion to Reverse Judgment, and in refusing to instruct the United States District Court below to grant leave to the petitioners to file an amended complaint.

ARGUMENT.

The United States District Court Had Jurisdiction Over the Petitioners' Cause of Action Against the Defendants—Agents of the Federal Bureau of Investigation—Said Cause of Action Being an Action for Damages Resulting From Alleged Unlawful Searches and Seizures, in Violation of the Fourth Amendment, and From Alleged False Imprisonment in Violation of the Fifth Amendment.[6]

The petitioners' cause of action would seem to meet the requirements as to original federal jurisdiction first enunciated by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. (19 U. S.) 264, 379:

> "A case in law or equity . . . may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends upon the construction of either."

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[6]The jurisdiction of the District Court is thus stated in the original complaint [R. 3]:

> "Jurisdiction of this Court is founded upon a Federal question arising under the Fourth and Fifth Amendments to the Constitution of the United States; and Title 5, U. S. Code, Section 300a[6a] as fully appears hereinafter. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00). Jurisdiction of this Court is founded upon the Federal question involving the rights of the individual plaintiffs and each of them to be free from deprivation of liberty without due process of law by false and unlawful imprisonment; and the Constitutional rights of all of the plaintiffs to be free from unreasonable searches and seizures. All of the persons who participated in the acts to be hereinafter complained of, with the exception of the defendant Merle Armstrong, were at the time of the commission of said acts, and at all times herein have been, officers of the Federal Government, to-wit, Special Agents of the Fed-

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[6a]U. S. C., Secs. 300 and 300a, are set forth in the Appendix herein.

In the case at bar the correct decision of the case depends upon the construction to be given by the federal courts to the Fourth and Fifth Amendments to the United States Constitution, and to Title 5, Sections 300, 300a, of the United States Code.

The complaint, to put the case somewhat differently, discloses federal jurisdiction because its allegations come within the tests of federal jurisdiction as outlined by Justice Cardozo in *Gully v. First National Bank*, 299 U. S. 109. As Justice Cardozo put it (at p. 112):

"How and when a case arises 'under the Constitution or laws of the United States' has been much con-

eral Bureau of Investigation, U. S. Department of Justice, and claim to have acted under and by virtue of the Provisions of Sections 300 and 300a of Title 5, U. S. Code aforesaid, and have acted in concert as is more particularly set forth hereinafter."

The jurisdiction of the District Court is set forth more fully and more carefully in the verified "Proposed Amended Complaint" submitted to the Court of Appeals below, as follows:

"Jurisdiction of this Court is founded upon a Federal question arising under the Fourth and Fifth Amendments to the Constitution of the United States; and Title 5, U. S. Code, Sections 300 and 300a, as more fully appears hereinafter. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3000.00). Jurisdiction of this Court is founded upon the Federal question involving the rights of the individual plaintiffs and each of them to be free from deprivation of liberty without due process of law by false and unlawful imprisonment in violation of the Fifth Amendment to the Constitution; and the rights of all of the plaintiffs to be free from unreasonable searches and seizures, in violation of the Fourth Amendment. All of the defendants at all times herein were and are officers of the Federal Government, to-wit, Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice,[6b] and claim to have acted under and by virtue of the provisions of, and under the authority of Section 300 and 300a of Title 5, U. S. Code aforesaid, and as said federal officers, and solely because of said authority, and as said officers.

[6b]The defendant Merle Armstrong, Los Angeles City Police Officer, is dropped as a defendant in the Proposed Amended Complaint.

sidered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."

". . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction *or* effect, 'and defeated if they receive another' . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto, . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal."

"Said defendants and each of them, however, abused their power and authority as said federal officers, and as said agents of the Federal Bureau of Investigation, as will appear more particularly hereinafter.

"The District Court of the United States for the Southern District of California has jurisdiction in the premises, more particularly, in that it is a suit of a civil nature arising under the Constitution and the laws of the United States, in the following respects:

"The construction or effect of the following constitutional and statutory provisions is in issue:

"A. Constitutional Provisions.

1. Whether or not the searches and seizures by the defendants hereinbelow complained of were unreasonable, in violation of the Fourth Amendment.

2. Whether or not the imprisonment of the plaintiffs by the defendants to be hereinbelow set forth, deprived the plaintiffs of liberty without due process of law, in violation of the Fifth Amendment.

"B. Statutory Provisions.

1. Whether or not either or both the searches and seizures by the defendants, and the imprisonment of the plaintiffs by the defendants, violated the rights of the plaintiffs conferred upon them by Title 5, U. S. Code, Sections 300 and 300a, by violating the limitations of power imposed upon said defendants by said laws."

[Appendix "A" attached to Motion to Reverse Judgment, printed following p. 180 of the Record.]

If the scope of Articles IV and V of the Bill of Rights and Title 5, U. S. Code, Sections 300 and 300a, are given a construction or effect by the federal courts favorable to the petitioners, the petitioners' rights will be supported and they will be entitled to prevail; if, on the other hand, the federal courts give these same provisions of the Federal Constitution and these same federal statutes a different construction or effect, adverse to the petitioners and favorable to the defendants, the petitioners' claims will be defeated.

Hence the complaint raises a substantial controversy as to the scope, meaning or effect of provisions of the Federal Constitution, and requires the federal courts to pass upon, construe and interpret certain particular federal statutes. A consideration and interpretation of these federal statutes, as well as the provisions of the Fourth and Fifth Amendments to the Constitution, by the District Court, was necessary, indispensable and inescapable. The controversy between the petitioners and the defendants as to the meaning, scope and effect of the constitutional provisions and the federal statutes referred to, is substantial, direct, genuine, and is disclosed affirmatively and completely in the complaint itself.

Moreover, in the instant case, the search alleged to have been carried out by the defendants is asserted to be "unreasonable" within the proscriptions of the Fourth Amendment. The complaint accordingly called for a construction by the federal courts, including the District Court below, as to the meaning and application of the phrase "unreasonable"—a construction which could have been made adequately by the District Court below only after a hearing on the merits, and not by the District Court's summary dismissal of the complaint.

Where the construction by the courts of a phrase in a federal statute is required, the cause may be deemed to "arise" under a law of the United States, within the meaning of 28 U. S. C., Sec. 41 (1). This would seem to be the import of the decision of this Court, in *Tunstall v. Brotherhood of Locomotive Firemen and Engineers*, 323 U. S. 200. There this Court ruled that a federal District Court had jurisdiction because called upon to construe and apply the phrase "representative" in the Railway Labor Act; here the District Court was called upon to construe and apply the phrase "unreasonable" in the Fourth Amendment.

Said the Chief Justice, for this Court, in the *Tunstall* case:

> "We also hold that the right asserted by petitioners which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. 'The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted.' "[7]

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[7]The Department of Justice, in a brief *amicus curiae* filed in the *Tunstall* case thus stated the applicable law:

> "The cause of action in the *Tunstall* case thus 'Clearly has its origin (in) and is controlled by the Railway Labor Act, and this is sufficient.' "

We paraphrase thus the language of the Department of Justice as applied to the instant case: The cause of action of the petitioners thus clearly has its origin in, and is controlled by, the Fourth and Fifth Amendments; and this is sufficient.

On the facts, it might be claimed that the instant case is stronger than *Tunstall's* case: for in the latter, the suit was for damages (and injunction) against *private parties*; here it is for damages against *federal officers*, who, as alleged in the complaint, claim to have acted as such and under their authority as such officers, and in the pursuit of their employment as federal officers.

In any event, the language of this Court in the *Tunstall* decision may be thus paraphrased to apply to the instant case:

The rights asserted by the petitioners are derived from the guarantees of the Fourth and Fifth Amendments; and arise from a duty imposed by these Articles of the Bill of Rights, upon the defendants, as law enforcement officers, not to abridge those guarantees. These rights of the petitioners are expressed in the Constitution; and the duty imposed upon the defendants not to abridge them, is implied from the Constitution. It is the Federal Constitution that condemns the conduct of the defendants complained of in the petitioners' complaint as unlawful. And, finally, the extent, nature, and legal consequences of the constitutional condemnation of the Fourth and Fifth Amendments, though left to judicial determination, are nevertheless to be derived from those Amendments, and from the federal policy they have adopted. The petitioners' case is therefor one arising under the federal Constitution.

Certainly the complaint poses a "federal question," within the requirements set forth in *Sola Electric Co. v. Jefferson*, 317 U. S. 173, 176:

> "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal ques-

tions, the answers to which are to be derived from the statute and the federal policy which it has adopted."

In the instant case, the extent and nature of the legal consequences of the condemnation in the Federal Constitution of "unreasonable" searches and seizures, though left to judicial determination, must perforce raise a "federal question."

That a United States District (or Circuit) Court has jurisdiction in a suit for damages against federal officers acting in excess of their authority seems never heretofore to have been questioned in, or by, this Court. Indeed, such jurisdiction has been assumed by this Court in a line of cases beginning with *Little v. Barreme*, 2 Cranch 170 (1804)—a noteworthy decision written by Chief Justice Marshall upholding damages against a United States Naval officer in the sum of $8,504.00 for his unlawful seizure of a vessel. So in *Tracy v. Swartwout*, 10 Pet. 80 (1836), such jurisdiction was unquestioned. Again in *Mitchell v. Harmony*, 13 How. 115 (1851), a judgment of the United States Circuit Court was affirmed by this Court against military officers in the sum of $90,806.44, for unlawful seizure of private property.[8]

In *Belknap v. Schild*, 161 U. S. 10 (1895), jurisdiction of a United States Circuit Court in a suit for damages against a federal officer was impliedly assumed by this Court when it reversed a judgment because the case was in equity, "without prejudice to an action at law against the defendants," presumably in a United States Circuit Court.

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[8]In *Mitchell v. Harmony* there was a diversity of citizenship.

Another such suit in this Court, from a United States Circuit Court is *Cammeyer v. Newton*, 4 Otto (94 U. S.) 225 (1877).

No decision of this Court has assumed or intimated any lack of jurisdiction in the federal courts to entertain a suit for damages against *federal* officers, alleged to have violated any federal constitutional right of any citizen.[9]

Furthermore, the cases which sustain the jurisdiction of federal District Courts in suits for damages against federal officers, involving the construction or effect of process or of bonds, are not to be distinguished away. They are *Bock v. Perkins*, 139 U. S. 628; *Howard v. United States*, 184 U. S. 676 and *U. S. ex rel. Rogers v. Conklin*, 1 Wall. (68 U. S.) 714. Surely if there is jurisdiction in the federal courts, in suits against federal officers for damages, under process or instruments *authorized* by a federal statute, there must then the more certainly be jurisdiction, where the suit arises out of a federal statute (or the Constitution)[10] *directly*.

Still other decisions of this Court support the jurisdiction of the District Court below. They sustain the jurisdiction of the federal courts to accord relief against federal officers acting in abuse of power, on the equity side of the court's process. They are: *Philadelphia Company v. Stimson*, 223 U. S. 605; *Goltra v. Weeks*, 271 U. S. 536, and *Waite v. Macy*, 246 U. S. 606; *American School*

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[9]On the precise question as to whether a federal District Court has jurisdiction in a suit against federal officers seeking damages resulting from an alleged unreasonable search and seizure, there seems to be only one decision suporting the opinion of the Circuit Court below. It is by a United States District Court, *Taylor v. DeHart*, 22 Fed. (2d) 206 (D. C. Mo., 1926).

[10]The source of all federal statutes.

of Magnetic Healing v. McAnnulty, 187 U. S. 94, and *Panama Refining Co. v. Ryan*, 293 U. S. 388 and a line of similar cases. It would seem that it can make no difference whether the suit against a public officer for "abuse of power" is for damages resulting from an abuse committed, or is for an injunction to restrain an abuse threatened; for Title 28, U. S. C. A., Sec. 41 (1) confers jurisdiction upon the United States District Courts:

> "where the matter in controversy . . . arises under the Constitution or laws of the United States . . . of *all* suits of a civil nature at *common law or equity*." (Italics ours.)

Cf. also *Perkins v. Elg*, 307 U. S. 325, and *Hannegan v. Esquire, Inc.*, No. 399, this term.

The heart of the question is whether a federal right is in issue: if the federal right is *threatened* by a federal officer acting beyond his authority, the citizen's remedy is by *injunction*, on the equity side of the federal court; if the federal right *has already been abridged*, the remaining judicial remedy against the federal officer, is by an action for *damages*, on the law side of the federal court.

The Decision of the Circuit Court Below Analyzed.

1. The decision of the Circuit Court finds strict legal support in only one court decision—that of a United States District Court. *Taylor v. DeHart*, 22 Fed. (2d) 206 (D. C. Mo.) is the only reported decision holding that a suit against federal officers for damages resulting from unlawful search and seizure may not be prosecuted in a federal District Court.

2. The Circuit Court accepts, in principle, decisions of this Court [R. 174], *Cohen v. Virginia*, 19 U. S. 264; *Osborn v. Bank of the United States*, 9 Wheat. 738,

but fails to apply the law of these cases to the instant case.

3. The Court below seeks to distinguish the *Tunstall* case, because the latter arose under a law regulating commerce.

But the particular federal statute under which a cause of action arises can make no difference. Title 28, Sec. 41 (1) gives no priority to any federal law.[11]

28 U. S. Code, Sec. 41 (8) is comparable to 28 U. S. Code, Sec. 41 (1). Section 41 (8) confers original jurisdiction on the United States District Courts in suits "arising under any law regulating commerce;" Sec. 41 (1) (a) confers such jurisdiction where a suit "*arises* under the Constitution or laws of the United States." (Italics supplied.) Whether or not a suit thus "arises" poses the same question of law, and of statutory construction, under either Sec. 41 (1) (a), or under Sec. 41 (8).

The only difference between the two sub-sections is that subsection (8) contains no minimum monetary requirement as does subsection (1) (a). That the instant complaint discloses a controversy exceeding the sum of $3000 is not questioned. (Compare the statement of the Circuit Court below:) "The damages prayed for far exceed the jurisdiction requirements as to value in controversy." [R. 169.]

4. In so far as the Circuit Court below relies heavily, in its reasoning, on the "conspiracy" allegations in the original complaint [as for example at R. 174, 171], its decision is wanting in support, in view of the "Proposed Amended Complaint" which the petitioners sought permis-

[11]So far as jurisdiction of the federal District Courts are concerned, the Constitution is at least on a par with federal statutes. Cf. 28 U. S. C., Sec. 41 (1).

sion to file in the District Court, in which Amended Complaint all conspiracy recitals are omitted [p. 12 of Appendix "A" attached to Motion to Remand Cause, appearing following p. 180 of the Record herein].

The Circuit Court proffers no reason for its refusal to remand the cause to the District Court, to afford the petitioners an opportunity to file an Amended Complaint omitting all the conspiracy features of the original complaint [R. 178].

The "Proposed Amended Complaint" outlined in specific detail the constitutional and statutory provisions, the construction or effect of which are put in issue by the Amended Complaint, as follows:

"A. Constitutional Provisions.

1. Whether or not the searches and seizures by the defendants hereinbelow complained of were unreasonable, in violation of the 4th Amendment.

2. Whether or not the imprisonment of the plaintiffs by the defendants to be hereinbelow set forth, deprived the plaintiffs of liberty without due process of law, in violation of the 5th Amendment.

"B. Statutory Provisions.

1. Whether or not either or both the searches and seizures by the defendants, and the imprisonment of the plaintiffs by the defendants, violated the rights of the plaintiffs conferred upon them by Title 5, U. S. Code, Sections 300 and 300a, by violating the limitations of power imposed upon said defendants by said laws." [Appendix "A," p. 13, attached to Motion to Reverse Judgment, appearing in the Record following p. 180.]

The complete text of the jurisdictional allegations both in the original complaint and the proposed amended complaint are set forth in footnote 6, at pp. 7-9, *supra*.

Conclusion.

The defendants have authority, power and prestige on their side; the petitioners are associates of a minority group, at the moment convicted of "sedition"[12]—the victims, they believe, of wartime prejudices and passions.

But the defendants, no matter their power or prestige, are not above the law; and the petitioners no matter their guilt or innocence, are not outside the pale of constitutional protection.

Under our form of government, the only remaining governmental agency with the authority and duty to bring the defendants to account at the bar of justice on the one hand, and to accord to the petitioners, on the other hand, the reality of constitutional right[12a]—is the courts.

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[12]Their appeal from the conviction is now pending before the Ninth Circuit Court of Appeals, *Bell v. United States*, No. 10432, 9 C. C. A. Charged with "sedition," the petitioners claim to be the victims of a political persecution. The constitutional guarantee against unlawful searches and seizures demands the more scrupulous protection at the hands of the courts where, as claimed by the petitioners, such searches are "used by a government determined to suppress political opposition under the guise of sedition." (Judge Hand in *U. S. v. Kirschenblatt* (C. C. A. 2), 16 Fed. (2d) 202, 203.) Cf. in accord, Zechariah Chafee, Jr. in "Freedom of Speech in the United States," at p. 242, dealing with the experiences of John Wilkes.

[12a]The importance of the constitutional immunity from unreasonable searches is attested to by a long line of decisions by this Court:

Boyd v. United States, 116 U. S. 616 (1886);
Weeks v. United States, 232 U. S. 383 (1914);
Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920);
Gouled v. United States, 255 U. S. 298 (1921);
Federal Trade Commission v. Amer. Tobacco Co., 264 U. S. 298 (1924);
Byers v. United States, 273 U. S. 28 (1927);

The District Court below had ample jurisdiction so to do.

What is there in law, in reason, and in common fair dealing[13] to prevent this Court from so ruling?[13a]

Go-Bart Importing Co. v. United States, 282 U. S. 344 (1931);
United States v. Lefkowitz, et al., 285 U. S. 452 (1932);
Grau v. United States, 287 U. S. 124 (1932);
Sgro v. United States, 287 U. S. 206 (1932);
Taylor v. United States, 286 U. S. 1 (1932);
Nathanson v. United States, 290 U. S. 41 (1933).

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[13]To the petitioners, the effect of an action by this Court, relegating them to pursue their cause in the state courts, will be more than an academic ruling on the appropriate forum to assert their claims. A cause of action for illegal abridgment of personal rights is barred by California law, by a one year Statute of Limitations. (California Code of Civil Procedure, Sec. 340.) This statutory period had elapsed prior to the ruling of the District Court below. The alleged unreasonable searches and seizures took place on December 18, 1942. The instant complaint was filed seasonably in the United States District Court below, on April 7, 1943 [R. I, 30]. The District Court, delaying many months, did not order the complaint dismissed, of its own motion until *March 20, 1944*, when the California one-year Statute of Limitations had run. Upon the filing of a suit in the state courts the Superior Court of Los Angeles County, subsequent to the District Court's ruling, the defendants herein, again represented by the United States Attorney, filed a demurrer urging the one year Statute of Limitations. The Los Angeles Superior Court sustained the demurrer, so far as the cause of action in the State Court involved abridgment of personal rights. *Bell v. Adams*, Los Angeles Superior Court, No. 492469.

[13a]That "lawlessness in law enforcement" has been widespread in the United States is a matter of common knowledge. The extent of such lawlessness was exposed by the "National Commission on Law Observance and Enforcement," in its "Report on Lawlessness in Law Enforcement" (United States Gov't Printing Office, Washington, 1931). Unlawful searches and seizures constitute one of the acts of official lawlessness considered by a subcommittee of the National Commission ("Report on Lawlessness in Law Enforcement," *supra*, p. 340.)

The following, amongst other discussions of the extent of official lawlessness, appears in the law reviews:

Said Justice Cardozo in the *Gully* case (299 U. S. 109, 117):

> "What is needed (in determining whether a case arises under the Constitution or law of the United States) is something of that common sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation."

Said the Solicitor General of the United States in the Department of Justice's brief in the *Tunstall* case (Brief of *Amicus Curiae*, p. 42):

> "Obviously the enforcement of duties created by the Federal Act (the Railway Labor Act) should not be left exclusively to the State Courts."

"Responsibility for a 'vicious policeman'"; 50 American Law Rev. 127, Jan. 1916.

"The 'Third Degree' in America," 91 Justice of Peace (Eng.), 847, Nov. 5, 1927.

"Official Lawlessness," 33 Law Notes 201, Feb. 1930.

"The Third Degree" (Editorial), 32 Law Notes 202, Feb. 1929.

"Abstract of the 'Wickersham' Police Report." August Vollmer. 22 Jour. Crim. Law 716-23. Jan. 1932.

"Our Lawless Police," a review by L. Hazard, 3 Mo. Bar Jour. 149, 151. Sept. 1932.

"The Third Degree," by R. W. Bishop, 18 Boston U. Law Rev. 630-640, June, 1938.

"Confessions, and Methods Employed in Procuring Them." 4 So. Calif. Law Rev. 83.

"How Can the Third Degree Be Eliminated," by Sam B. Warner, 1 Bill of Rights Rev. 24.

Cf. "Concerning Searches & Seizures," 34 Harv. Law Rev. 361.

See also: Jerome Hopkins' "Our Lawless Police." Viking Press, 1931.

While the Department of Justice, through its vigorous Civil Rights Section, has done much to curb lawlessness by *state* officers (see "Civil Liberties Section of the Department of Justice," by Henry A. Schweinhaut, 1 Bill of Rights Rev. of American Bar Ass'n, 207 [Spring 1941]; Cf. *Screws v. United States*, 322 U. S. 718), there has been no comparable governmental agency to check the activities of over-zealous, but nonetheless lawless, on occasion, federal officers. Hence there is a special obligation in the *federal* courts to inquire into the conduct of *their* officers.

Just as obviously, common sense calls for a ruling from this Court, that the federal District Court below had jurisdiction of this cause. Is it "common-sense" to shut the doors of the *federal* courts to the citizen when his complaint is that a *federal* official, in the course of *federal* employment, acted under color of *federal* authority, but in excess of *federal* power, and in violation of the citizen's federal rights?[14]

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[14]The instant cause poses the problem of comity between the federal and state courts, in reverse of the phase in issue in *Watson v. Buck*, 313 U. S. 387; *Douglas v. Jeanette*, 319 U. S. 157, and companion cases. Here we have no congressional policy leaving primary jurisdiction to state tribunals. On the contrary, congressional policy is to the effect that the United States District Courts shall have primary jurisdiction over violation by federal officers of the Fourth Amendment.

Cf. *Lefkowitz v. United States*, 285 U. S. 452, upholding the jurisdiction of the federal courts to order the return of papers illegally seized, without a search warrant. Cf. 18 U. S. C., Sec. 626, conferring jurisdiction on the federal courts to order the return of documents illegally seized, under a search warrant. See also, 18 U. S. C., Sec. 353a and Sec. 631, conferring jurisdiction on the federal courts for the prosecution of federal officers for illegal searches, without, and with, respectively, search warrants.

It seems passing strange, accordingly, that a controversy involving the conduct of *federal* officers should be relegated to the *state* courts for airing and arbitrament. Common sense and logic would seem to suggest that the appropriate forum for misconduct by *state* officers should originally be the *state* courts; and, contrariwise, misconduct by *federal* officers should be passed upon by the *federal* courts.

The reluctance which this Court has shown in removing from the state courts original jurisdiction to determine the ambit of state problems, should be applied equally by the exercise of federal judicial self-restraint in thrusting upon the state courts, the burdens of airing controversies involving the misconduct of federal officers.

In the instant case the federal nature of the controversy is further seen from the fact that the federal government, through the United States Department of Justice, has defended the cause at all stages of the proceedings. Thus the defendants appeared by the United States Attorney for the Southern District of California in the trial court. [R. 31-32.] Similarly, the United States

The judgment of the Circuit Court of Appeals below should be reversed.[15] In the alternative, the order of the

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Attorney represented the defendants in the Circuit Court below. [R. 163.]

In this Court the defendants are represented by the Solicitor General.

Only because the Attorney General deemed the United States "interested" in the defense herein would such appearances be warranted.

5 U. S. C., Sec. 309; Cf. also 5 U. S. C., Sec. 306.

Moreover, by 28 United States Code, Section 76, the defendants, as "officers of the courts" of the United States, are in effect immunized from suit in the state courts. They may summarily remove a suit filed against them seeking damages for unlawful arrest and unreasonable searches, from the state courts, to the Federal District Courts. Upon such removal, the case shall "proceed as a cause originally commenced in that (the United States District) court."

In *Parry v. Delaney*, 310 Mass. 107, 37 N. E. (2d) 249 (1941), before the Supreme Judicial Court of Massachusetts the Department of Justice through the United States Attorney at Boston, then took the position that federal officers were not subject, in the state courts, to suits for damages or injunction in connection with alleged illegal conduct by them. The Supreme Judicial Court of Massachusetts so ruled.

United States Marshals and Deputy Marshals making arrests and conducting searches are "officers of the court" within 28 United States Code Section 76, *supra*. (See *Davis v. So. Carolina*, 107 U. S. 597.) For a discussion of the duties of FBI agents, comparable to those of the United States Marshal, under 5 United States Code, Sec. 300a, and 18 United States Code, Sec. 595, respectively, see *McNabb v. United States*, 318 U. S. 322, 341.

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[15]We dissent from the suggestion of the respondents in their brief in opposition, on certiorari (at p. 16) that the petitioners may secure adequate vindication of their rights by way of their motions to suppress the evidence, claimed by them to have been illegally seized, in the criminal prosecution against them, now on appeal.

Surely, the citizen should not be required to wait until he is prosecuted for crime, before he may have recourse in the federal courts to protest an unreasonable search and seizure. Were that the law, the "lawless" law-enforcement officer would be encouraged to evade criminal prosecution, in the more flagrant violations of the guarantees against unreasonable searches and seizures, in

Circuit Court below denying the petitioners' Motion to Reverse Judgment with instructions to grant leave to file an amended complaint, should be reversed.

Respectfully submitted,

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order to avoid judicial reprimand. And thus the guilty citizen would go unpunished, along with the lawless official.

Nor does the existence of federal criminal penalties for unlawful searches and seizures (18 U. S. Code, Sec. 53a) afford adequate redress. The instant case is evidence in point. Instead of prosecuting the respondents, Government counsel, low and high, have entered the lists supporting the defense of the respondents, rather than protecting the rights of the petitioners. Thus the United States Attorney, in the courts below, at government expense, has appeared in behalf of the respondents; the Solicitor General of the United States similarly appears in their behalf in this Court. If successful, the effect of their aid will be that not only will the respondents not have been prosecuted for a violation of the federal statute imposing penal sanctions for unlawful searches and seizures, but they will be immunized from civil liability for the unlawful arrest and imprisonment of the petitioners, by virtue of the lapse of the California Statute of Limitations.

That the only substantial deterrent to the "lawless enforcement of the law" and to public officers so disposed is the prospect of civil suits for damages for lawless official conduct, seems to be the lesson of experience.

Only by keeping the doors of the Federal District Courts wide open to citizen suitors seeking a vindication of their constitutional rights against federal officers who have violated them—whether the suit is for injunction or for damages—can we square our domestic judicial policy without international judicial policy towards international lawlessness.[a]

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[a]In opposing a weak international policy on international official lawlessness, Justice Robert H. Jackson, as Chief of Counsel for the United States in the prosecution of Axis War Criminals, in his official report to the President on June 7, 1945, explained that such a policy should in any event not be "inconsistent with the position we take toward our own officials, who are frequently brought to court at the suit of citizens who allege their rights to have been invaded."

APPENDIX.

Title 28, Section 41. (Judicial Code, Section 24, amended.) Original jurisdiction.—The district courts shall have original jurisdiction as follows:

(1) *"United States as plaintiff; civil suits at common law or in equity.*—First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects."

Title 5, U. S. Code, Section 300:

"Officials for detection and prosecution of crime.—For the detection and prosecution of crimes against the United States, and for the acquisition, collection, classification, and preservation of criminal identification records and their exchange with the officials of States, cities, and other institutions, the Attorney General is authorized to appoint officials who shall be vested with the authority necessary for the execution of such duties."

Title 5, U. S. Code, Section 300a:

"*Director, assistant directors, agents, and inspectors of division of investigation empowered to serve process, make arrests.*—The Director, Assistant Directors, agents, and inspectors of the Division of Investigation of the Department of Justice are empowered to serve warrants and subpoenas issued under the authority of the United States; to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer. Such members of the Division of Investigation of the Department of Justice are authorized and empowered to carry firearms."

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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 344

ARTHUR L. BELL ET AL.,

Petitioners,

vs.

R. B. HOOD ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

RUSSELL E. PARSONS,
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PETITIONERS' REPLY BRIEF

I. Petitioners' Reply to Respondents' Statement

1. The respondents' statement is posited largely, not on the allegations contained in the petitioners' complaint which, the trial court ruled, failed to disclose jurisdiction (R. 151, but on affidavits and counter-affidavits submitted to the trial court in connection with a motion for summary judgment made by the respondents (R. 42). These affidavits, and the portions of the respondents' statement relying upon the affidavits, should be ignored by this Court for the following reasons:

(a) Neither the District Court (R. 151) nor the Circuit Court below (R. II, 168) based their ruling upon the affi-

davits, nor even considered them. Their decisions were arrived at solely upon a consideration of the recitals contained in the complaint, which complaint the courts below, respectively, ruled, did not state a cause of action conferring jurisdiction upon the trial court. No reference is made by either court below to the affidavits as the basis for their decisions. Cf. Opinion of District Court (R. 145); Opinion of Circuit Court (R. 168).

(b) The evidence submitted by the respondents, in support of their motion for summary judgment, constituted *defensive* material, which under the respondents' own theory, may not be considered in determining the jurisdiction of the District Court (Cf. Brief for Respondent, p. 24).

Accordingly, this Court should ignore all portions of the respondents' statement relying upon factual material appearing in the Record, other than those set forth in the petitioners' complaint.[1] Accordingly, if this Court limits itself to an appraisal of the import of the recitals in the petitioners' complaint, it will readily find itself in accord with the observation of the Circuit Court below that: "There can be no question but that the complaint states strong cases, and if the allegations have any foundation in truth, the plaintiffs' legal rights have been ruthlessly violated" (R. 173). (Italics ours.)

2. The references in the respondents' "statement" to the ruling of the trial court in the case of *Bell* v. *United States*, now pending on appeal in the Ninth Circuit Court of Appeals (*Bell* v. *United States*, 9 C. C. A., No. 10432), on

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[1]The petitioners' complaint appears in the Record at pp. 2-30; all page references in the Respondents' Brief to the Record from pp. 34-134 are references to affidavits and counter-affidavits; these should not be considered by this Court.

the occasion of the trial of the petitioners on criminal charges, are similarly out of place in the instant proceedings. The trial court below rejected the respondents' contention that the ruling of the trial judge in the criminal case was *res judicata* in the instant case (R. 157). From this ruling the respondents have neither taken, nor prosecuted, any appeal.

The reason for the respondents' thus venturing into fields *de hors* the Record in this case is not clear.

Nor does the relevancy of the respondents' reference to the petitioners' conviction upon charges of conspiracy to commit "sedition" appear, for this Court has ruled often enough that the constitutional guarantee against unreasonable searches and seizures protect the guilty as well as the innocent:

> "The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. * * * Its protection extends to offenders as to the law abiding." U. S. v. Lefkovitz, 285 U. S. 452, 464.

II. Reply to Respondents' Argument

1. The right of the petitioners to sue is not derived from local or common law, exclusively, as suggested by the respondents. By virtue of the express guarantees of the Fourth Amendment, the right to be free from unreasonable searches and seizures, formerly a general right arising out of general or common law, became a specific federal constitutional right expressly protected by the federal Constitution. It is for the vindication of that expressly vouchsafed federal constitutional right, that the petitioners filed their complaint in the federal District Court below. That the common law buttresses their rights, does not undermine its federal constitutional support and express federal sanction.

The respondents misread Title 28, U. S. Code, Sec. 41(1) when they, in effect, substitute the word "create" for the word "arise." The word "create" is also substituted for the provision of the statute which contains the phrase "arises" in unfortunate dicta in *Gully* v. *First National Bank*, 299 U. S. 109, 112, and *Puerto Rico* v. *Russel & Co.*, 288 U. S. 476, 483 (quoted in Respondents' Brief, p. 16).

Moreover, California common law does not expressly guarantee the citizen freedom from unreasonable searches and seizures; and no claim has been made by the respondents, nor can the claim be made, that California law protects the citizen of the United States from unreasonable searches and seizures, as "broadly" as does the Fourth Amendment, and the liberal construction of that Amendment given by the federal courts. Thus Sec. 3274 of the California Civil Code provides merely:

> "Species of Relief. As a general rule, compensation is a relief or remedy provided by the law of this state for the violation of private rights, and the means of securing their observance; and specific and preventive relief may be given in no other cases than those specified in this part of the Civil Code."

This is just a general rule pertaining to the right to relief generally; it is to be noted that that section of the California Code (cited in Respondents' Brief at p. 17) expressly limits relief in the California courts to those specified in the California Civil Code.

Also, even if the common or state law of California were adequate, this is no argument against the existence of concurrent jurisdiction in the District Courts of the United States under 28 U. S. Code, Sec. 41(1). Thus, even if the acts of the defendants may be termed "torts" or "trespasses," as distinguished from direct violations of the constitutionally protected right against unreasonable searches and seizures, there is jurisdiction in the Federal District

Courts because they have authority to enjoin a threatened trespass by federal officers. This seems to be the import of the ruling of this Court in an opinion by Justice Black just handed down in *Mine Safety Appliances Company* v. *Forrestal*, decided December 10, 1945, and reported in 90 Law. ed. (Adv. Op.) 165, 167. In that case, *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, is followed, and the Court, in passing, suggested that there would be jurisdiction in a United States District Court where a complaint sought a court injunction against "a threatened *trespass* against any property in the possession of or belonging to the appellant." (Italics ours.)

Furthermore, the Solicitor General's statement in reply to a question from the Chief Justice, in the course of the oral argument, which statement was to the effect that constitutional provisions do not give rise to a cause of action in the federal courts, unless Congress has implemented a constitutional provision with express statutory authority for the filing of a suit in the federal courts, is answered by the provisions of Title 28, U. S. Code, Sec. 41(1), which provides that a cause of action may arise from the "Constitution *or* laws of the United States," and not, as would be the effect of the claim of the Solicitor from the "Constitution *and* laws of the United States."

2. Moreover, there is no express federal statute conferring jurisdiction in the federal District Courts to enjoin federal officers from threatened illegal or unconstitutional conduct; yet the respondents concede such jurisdiction (Respondents' Brief, p. 30). (*Ickes* v. *Fox*, 300 U. S. 82, 95, would, in any event, seem to be conclusive upon the jurisdiction of the federal courts to grant such injunctions.) See also *Texas and New Orleans Railroad* v. *Brotherhood*, 281 U. S. 548, 569, to the effect that where a statutory right is created, the federal District Courts have jurisdiction, by appropriate process, to enforce that right,

although Congress has not expressly conferred such jurisdiction. It would seem to follow that where a right is guaranteed or protected by an express provision of the Federal Constitution, the courts of the United States are not powerless to enforce such right because Congress has not taken the trouble expressly to instruct the federal courts to accord such protection.

It would seem that for an illegal search and seizure the following federal proceedings may be instituted:

(1) The aggrieved person may file a claim with the Attorney General if the federal officers, as in the case at bar, are special agents of the FBI, but only for a sum not to exceed $500. 31 U. S. Code, Sec. 224.

(2) The federal officer may be prosecuted for a criminal charge. 18 U. S. Code, Sec. 53(a) and Sec. 631.

(3) If the illegal search has not yet taken place but is threatened, the federal officer may be enjoined. See *Ickes* v. *Fox*, *supra*.

(4) A petition may be filed in the federal court to recover the property illegally seized. *U. S.* v. *Lefkowitz*, 285 U. S. 452.

(There is no special congressional statutory enactment authorizing the last two proceedings.)

(5) A suit for damages in a United States District Court. Where the citizen claims damages in excess of $500, and hence the filing of a claim with the Attorney General would be inadequate, there should be no reason why, under the broad provisions of Sec. 41 (1) of 28 U. S. Code, he may not sue for damages in the United States District Court; just as he might apply for the return of documents illegally seized or apply for an injunction before the search has been made.

3. Insofar as the complaint recites a violation of the rights of the petitioners under the Fourth Amendment, the complaint does not contain "an anticipatory replication to a probable defense" (Respondents' Brief, p. 24).

If, as the respondents claim, the trial courts' order dismissing the complaint was under 28 U. S. Code, Sec. 80 (Respondents' Brief, p. 2) and that it was proper for the trial court, as well as it is for this Court, to consider the defensive material proffered by the defendants in support of their motion to dismiss and for summary judgment appearing in the Record at pp. 34-134), then, at the time of the trial courts' order of dismissal, there was in direct issue the scope of Title 5, U. S. Code, 300(a). Hence the scope and meaning of that federal statute was directly in the case, then *not* by way of *anticipatory defense* on the part of the petitioners, but by way of *asserted defense* by the defendants themselves.

There was then before the District Court a real and substantial "dispute or controversy properly within the jurisdiction of said District Court" and within the meaning of 28 U. S. Code, Sec. 80.

4. To support their argument that "the decision below is in accord with the rulings in other circuits" (Respondents' Brief, p. 26), they cite two cases that are in point.

The first, *Viles v. Symes*, 129 F. (2d) 828, C. C. A. 10, certiorari denied, 317 U. S. 711, was an action filed and prosecuted, both in the courts below, and in this Court *in pro per*. A decision in a case in which the party litigant functions without the aid of skillful counsel, is hardly one that should be persuasive upon the important question of judicial policy in the instant case.

Taylor v. *De Hart*, 22 F. (2d) 206, was a decision by a District Court.

It is offset by the better-reasoned District Court opinion in *Rury* v. *Gandy*, 12 F. (2d) 620.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1945

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ARTHUR L. BELL, ET AL., PETITIONERS

v.

R. B. HOOD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California, Central Division (R. 145–159), is not officially reported. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R. 168–178) is reported in 150 F. 2d. 96.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 7, 1945 (R. 179). The petition for a writ of certiorari was filed on August

20, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the district court erred in dismissing the instant suit on the ground that it does not arise "under the Constitution or laws of the United States" within the meaning of Section 24 (1) (a) of the Judicial Code, 28 U. S. C. 41 (1) (a).

STATUTES INVOLVED

Section 24 (1) (a) of the Judicial Code, 28 U. S. C. 41 (1) (a), provides:

> The district courts shall have original jurisdiction as follows:
>
> First. Of all suits of a civil nature at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States * * *.

Section 37 of the Judicial Code, 28 U. S. C. 80, provides in part:

> If in any suit commenced in a district court * * * it shall appear to the satisfaction of the said district court, at any time after such suit has been brought * * *, that such suit does not really and substantially involve a dispute or con-

> troversy properly within the jurisdiction of said district court, * * * the said district court shall proceed no further therein, but shall dismiss the suit * * * and shall make such order as to costs as shall be just.

STATEMENT

Following an extensive investigation by the Federal Bureau of Investigation ("F. B. I."), the Federal Grand Jury for the Southern District of California returned a secret indictment (No. 15759) on December 17, 1942, in which the twelve petitioners, leaders and members of a voluntary association known as "Mankind United," were charged with conspiracy to commit sedition, a felony under the Act of June 15, 1917, Sec. 4, 40 Stat. 219, 50 U. S. C. 34 (R. 4, 6–8, 34). Warrants for the arrest of all the petitioners, to be executed either by the United States Marshal or by F. B. I. agents, were immediately issued by the United States District Court for the Southern District of California, and were handed to F. B. I. agents in that District for service (R. 35). Petitioners Bell, Burkey, Gloeckler, and Miller resided outside the Southern District of California and, as to them, a return of *non est* was made by the United States Marshal at Los Angeles on the afternoon of December 17, 1942 (R. 4, 7, 35). The United States Attorney then advised the re-

spondent R. B. Hood, F. B. I. Special Agent in Charge in Los Angeles, of the return of the warrants for the arrest of petitioners and directed their apprehension, authorizing the arrest of those beyond the Southern District as fugitives for whom warrants were outstanding (R. 35).

Thereupon, the respondent Hood notified the San Francisco Office of the F. B. I. by teletype of the return of the indictment, the issuance of the warrants, their delivery to Hood, the returns *non est* as to petitioners Bell, Burkey, Gloeckler, and Miller, and the directions from the United States Attorney for the arrest of petitioners (R. 35–36, 44, 56, 62, 66). In compliance with these directions, F. B. I. agents from the San Francisco office, respondents herein, arrested these four petitioners at San Francisco, Oakland, Denair, and Mountain View, respectively,[1] at approximately 7:30 A. M., December 18, 1942 (R. 44, 56, 62, 66). At the same time, the remaining eight petitioners were arrested by other F. B. I. agents (also respondents herein) at San Diego, Los Angeles, and Fresno, all within the Southern District of California, under the warrants of arrest issued by the district court (R. 69–70, 73, 76, 78–79, 82, 86–87, 89, 93).[2] In connection with each arrest, the ar-

[1] All these points are in California, but outside the Southern Judicial District.

[2] The F. B. I. timed all the arrests for 7:30 A. M. on December 18, 1942, in order to avoid the results of premature publicity (R. 86, 94).

resting agents searched the premises of each petitioner and took custody of pamphlets, circulars and other property known to such agents to be connected with the affairs of "Mankind United" and the offense charged in the indictment (R. 51–53, 57–59, 64, 68, 70–71, 74–75, 76–77, 79–80, 83, 87, 90–91, 94, 96).

Shortly after these arrests, several of the petitioners made a motion in the criminal case to suppress and to return evidence. The motion charged that the Government had violated the Fourth and Fifth Amendments (1) in taking Bell, Burkey, Gloeckler, and Miller into custody without warrants of arrest and without reasonable ground to believe that they had committed a felony and were likely to escape before warrants could be obtained; and (2) in taking "Mankind United" pamphlets and circulars without search warrants. After a full hearing on affidavits and testimony in open court, the motions to suppress were denied on February 13, 1943. *United States* v. *Bell*, 48 F. Supp. 986 (S. D. Cal.). Thereafter, all the petitioners except Gloeckler and Kelso were tried and convicted of conspiracy to commit sedition. Judgment was rendered on May 10, 1943, imposing a fine upon petitioners Askew and Jakeman and sentencing the remaining eight petitioners to imprisonment. An appeal from the convictions is

now pending in the Circuit Court of Appeals for the Ninth Circuit.[3]

On April 7, 1945, petitioners instituted the civil action here involved against Hood and the other F. B. I. agents who made the arrests on December 18, 1942, seeking damages of more than $1,000,000 on account of "false imprisonment and unlawful search and seizure" (R. 30, 2–3).[4] The complaint asserted that the district court had jurisdiction because (1) the case raised a federal question under the Fourth and Fifth Amendments, involving petitioners' right "to be free from deprivation of liberty without due process of law by false and unlawful imprisonment; and * * * to be free from unreasonable searches and seizures;" and (2) the defendants were F. B. I. agents who claimed to have acted under 5 U. S. C. 300, 300a (R. 3–4).[5]

The complaint alleged that respondents had "unlawfully conspired * * * to act beyond their authority" and to abridge petitioners' constitutional rights under the Fourth and Fifth Amendments by (a) searching their homes without search warrants and seizing papers and docu-

[3] Record on appeal in *Bell et al.* v. *United States*, No. 10432, C. C. A. 9.

[4] The complaint was filed on behalf of "Mankind United" as well as by the individual petitioners (R. 2).

[5] Merle Armstrong, a Los Angeles police officer named as defendant, was dropped from the suit by petitioners (R. 8, 171).

ments of petitioners and of "Mankind United," and (b) falsely imprisoning petitioners by arresting some of them without warrants and unreasonably delaying taking all of them before a committing officer (R. 8–9, 10–22).[6]

Respondents moved for a dismissal of the complaint and for summary judgment upon the grounds that (a) as officers of the United States,

[6] The general allegations as to all the petitioners (R. 8–9) were followed by specific allegations as to each one (R. 10–22). The allegations as to petitioner Bell (Division Superintendent of "Mankind United," whose apartments served as the organization's headquarters, R. 4, 10), illustrate those made as to each of the four petitioners apprehended without a warrant of arrest by San Francisco F. B. I. agents: That Bell's residence in San Francisco was broken into on the morning of December 18, 1942, by certain defendants without search or arrest warrants; that Bell was placed under arrest and his premises were searched and left in great disorder; that he was held in custody at his premises until 2:00 P. M. and then taken before a committing officer; that these defendants, at 2:00 P. M., took from his premises 12 cartons of documents and records of "Mankind United" as well as private papers, documents, and cash; and that he was not permitted to see his attorney, to have counsel, or to communicate with anyone (R. 10–12).

The allegations as to petitioner Askew illustrate those made as to the eight petitioners arrested within the Southern District of California under warrants of arrest: That two of the defendants entered her premises at 7:30 A. M., December 18, 1942, and falsely imprisoned her thereon, searched the premises against her will and without a search warrant, removed a large number of documents of "Mankind United" as well as private papers and documents, and held her in the San Diego city jail "until noon Saturday," without arraignment or commitment (R. 12).

they are immune from liability for acts done within the scope of their authority, and (b) the searches and seizures were incidental to lawful arrests and were valid (R. 31–34, 36–37, 40–41, 42–43, 46). After hearings before the district court (R. 156) on the motions, on certain affidavits filed by respondents (R. 43–97) and on counteraffidavits filed by some of the petitioners (R. 97–134), the court, upon its own motion, dismissed the suit for want of jurisdiction on March 20, 1944, pursuant to Section 37 of the Judicial Code, 28 U. S. C. 80 (R. 149–151, 137). The Circuit Court of Appeals for the Ninth Circuit affirmed (R. 179).

ARGUMENT

The district court held that it lacked jurisdiction because petitioners' right to recovery against respondents depended upon establishing that they had acted in a malicious or unlawful manner and had become personally liable, and that the action therefore did not arise "under the Constitution or laws of the United States" within the meaning of Section 24 (1) (a) of the Judicial Code, even though a constitutional right was alleged to have been violated by the alleged trespasses (R. 146–151, 154–156). The court below agreed, ruling that the complaint stated a cause of action in tort against the F. B. I. agents as individual trespassers and not in their official capacities (R. 169, 170, 173), and that no federal law has given jurisdiction over such torts to the federal courts (R. 177).

We submit that these decisions were clearly correct and that no review by this Court is warranted.

1. The sole ground upon which petitioners rest their contention as to original federal jurisdiction is that the case arises "under the Constitution or laws of the United States" within the meaning of Section 24 (1) of the Judicial Code, 28 U. S. C. 41. It is settled, however, that in order to establish jurisdiction under that Section, "a right or immunity created by the Constitution or laws of the United States must be an [essential] element * * * of the plaintiff's cause of action" so that the "right or immunity * * * will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." *Gully* v. *First National Bank*, 299 U. S. 109, 112–113; see also *Starin* v. *New York*, 115 U. S. 248, 257–258; *Louisville & Nashville R. R.* v. *Mottley*, 211 U. S. 149, 152; *Shulthis* v. *McDougal*, 225 U. S. 561; *First National Bank* v. *Williams*, 252 U. S. 504, 512; *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 483.

Measured by these standards, the complaint here involved clearly fails to state a case arising "under the Constitution or laws of the United States" within the meaning of Section 24 of the Judicial Code. The respondents are charged, not as officers of the United States, but as individuals allegedly personally liable for wilful and illegal arrests, entries on petitioners' premises, and seizure and de-

tention of petitioners' private property.[7] The liability thus asserted is that of individual trespassers[8] and petitioners' right to sue is derived from the local or common law. *Boyd* v. *United States*, 116 U. S. 616, 625–628; Throop, *Public Officers* (1892), § 724; Mechem, *Public Officers* (1890), § 770, 778.

The averment in the complaint (R. 4) that respondents "claim to have acted under and by vir-

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[7] Petitioners' complaint in the district court charged a conspiracy among respondents to make unlawful arrests, imprisonments, searches and seizures (R. 8–9 *et seq.*). In the court below petitioners submitted a "Proposed Amended Complaint for Damages for False Imprisonment and Unlawful Search and Seizure by Federal Officers," together with a "Motion to Reverse Judgment, with Instructions" to the district court to grant leave to file the amended complaint (see Appendix following R. 180; Pet. 3, 14–15, 21–22). Petitioners point out that the "Proposed Amended Complaint" eliminates the recital of conspiracy (Pet. 3). However, neither decision below was grounded on any technical point of pleading, and the court below, although it denied petitioners' motion to file the amended complaint (R. 178–179), characterized the allegations of the original complaint as charging "that defendants through the medium of unlawful and unreasonable searches and seizures, have violated" plaintiffs' rights under the Fourth and Fifth Amendments (R. 170). In point of fact, the "Proposed Amendment Complaint" does not entirely eliminate the allegation of conspiracy (Appendix, p. 17, following R. 180) and merely restates the allegations of the original complaint in argumentative style.

[8] *Buck* v. *Colbath*, 3 Wall. 334, 347; *Poindexter* v. *Greenhow*, 114 U. S. 270, 290; *Walker* v. *Collins*, 167 U. S. 57; *Dowling Bros.* v. *Andrews*, 19 F. 2d 961 (C. C. A. 7); *Goldman* v. *American Dealers Service*, 135 F. 2d 398, 400 (C. C. A. 2).

tue of" 5 U. S. C. 300 and 300a * was properly characterized by the court below as "allegations of probable defenses" (R. 178). Similarly, the allegations in the complaint (R. 3, 9) that respondents' conduct violated petitioners' rights under the Fourth and Fifth Amendments do not supply a basis for concluding that this suit for damages arises under the laws or Constitution of the United States within the meaning of Section 24 of the Judicial Code. Unlike suits for injunction, in which on such allegations the federal courts may in certain circumstances take jurisdiction (cf. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, cited in petition, p. 9, note 7) where protection is sought against direct and immediate invasion of personal or property interests federally protected, the present suit is one for substituted or secondary redress and no federal cause of action has been created. Congress could undoubtedly have done so, as in the Civil Rights Acts; but in the absence of such legislation it has repeatedly been held that actions for damages against federal officers based on alleged abuse of authority may not be maintained under Section 24 of the Judicial Code, *Taylor* v. *DeHart*, 22 F. 2d 206 (W. D. Mo.), dismissed for want of jurisdiction, 274 U. S. 726; *Viles* v. *Symes*, 129 F. 2d 828 (C. C. A. 10), certorari denied, 317 U. S. 633; *Walters* v. *Payne*,

* Authorizing F. B. I. agents to make arrests without warrants in certain circumstances.

292 Fed. 124 (C. C. A. 3), certiorari denied, 263 U. S. 715; *Chaskin* v. *Thompson*, 143 F. 2d 566 (C. C. A. 9); *Dowling Bros.* v. *Andrews*, 19 F. 2d 961 (C. C. A. 7); cf. *Cooper* v. *O'Connor*, 99 F. 2d 135 (App. D. C.), certiorari denied, 305 U. S. 642.

The decisions of this Court relied on by petitioner (Pet. 7–8) are readily distinguishable. Indeed most of them arose prior to 1875, when for the first time the district courts were given general jurisdiction over cases arising under the laws of the United States. *Little* v. *Barreme*, 2 Cranch 170, arose out of a libel in admiralty. *Tracy* v. *Swartwout*, 10 Pet. 80 (decided in 1836, not 1886 as stated in the petition, p. 7) was a case removed from a state court under the familiar provisions permitting removal of suits against officers for acts done under the authority of the revenue laws. *Mitchell* v. *Harmony*, 13 How. 115, was founded upon diversity of citizenship, as the opinion indicates (pp. 136–137). *Belknap* v. *Schild*, 161 U. S. 10, and *Cammeyer* v. *Newton*, 94 U. S. 225, were actions for patent infringement. *Tunstall* v. *Brotherhood*, 323 U. S. 210, arose under a law regulating commerce, the Railway Labor Act, which created rights in favor of the class of which the plaintiff was a member.[10]

[10] Decisions such as *Bock* v. *Perkins*, 139 U. S. 628, and *Howard* v. *United States*, 184 U. S. 676, cited by petitioners as in conflict with the decision below (Pet. 9, 19), have no relation to the issues herein. Such cases involve suits against

2. Even if the rights asserted by petitioners had their origin in the Federal Constitution, the decision below was correct. For although the alleged rights may spring from a federal source, the district courts will not have jurisdiction if the decision in the case turns merely on questions of fact under state or common law, and does not involve the construction or effect of federal law. *Gully* v. *First National Bank*, 299 U. S. 109, 112–113; *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 483; *Germania Insurance Co.* v. *Wisconsin*, 119 U. S. 473, 476; *Barnhart* v. *Western Maryland Ry. Co.*, 128 F. 2d 709, 712–714 (C. C. A. 4), certiorari denied, 317 U. S. 671. In such a situation, any question of constitutional or federal law which

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ministerial officers, marshals, or court clerks in their official capacity, and are generally brought on the officer's bond under statutes specifically authorizing such suit. See *Gay* v. *Ruff*, 292 U. S. 25, 34; *Feibelman* v. *Packard*, 109 U. S. 421. Similarly inapposite are the cases arising on territory held by the Federal Government under its general governmental powers, such as federal prisons or the District of Columbia (*Hunt* v. *Evans*, 10 F. 2d 892 (App. D. C.); *Cooper* v. *O'Connor*, 99 F. 2d 135 (App. D. C.), certiorari denied, 305 U. S. 642) and cases dealing with property in the custody of a federal court, usually brought under specific statutory authorization. *Goldman* v. *American Dealers Service*, 135 F. 2d 398 (C. C. A. 2).

There is, of course, a clear difference in scope between the constitutional judicial clause (Art. III, § 2) and the grant of original jurisdiction to federal courts under Section 24 of the Judicial Code. *Gully* v. *First National Bank*, 299 U. S. at 113; *Gay* v. *Ruff*, *supra*, at 35; *Tennessee v. Union and Planters' Bank*, 152 U. S. 545, 462.

may be "lurking in the background" is insufficient to ground federal jurisdiction. *Gully* v. *First National Bank, supra,* at p. 117.

In the instant case, the hearing on the motions before the court below made it clear that there was no disputed question as to the construction or effect of any constitutional provision or federal statute, and that the sole issue was whether the respondents, not questioning or denying petitioners' legal rights, impinged upon them by acting without probable cause or unreasonably, or by making searches not incident to the arrest.[11]

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[11] The affidavits filed by respondents in support of their motion to dismiss illustrate the nature of the issues presented. The affidavit of respondent Langdon (R. 43–55) a San Francisco F. B. I. agent, responding to Bell's allegations, states: After receiving official information on December 17, 1942, of Bell's indictment and the issuance of a warrant for his arrest, and the return *non est* made by the United States Marshal at Los Angeles, Langdon and four other F. B. I. agents went to Bell's apartment in San Francisco at 7:30 A. M., December 18, 1942, knocked at the door and requested to be admitted, telling Mrs. Bell that they were federal officers and that a warrant for Bell's arrest was outstanding under the indictment. Mrs. Bell kept the door locked and no response was made from the apartment to repeated knocks on the door, ringing of the doorbell, and telephone calls from the apartment lobby. To prevent the destruction of evidence, the F. B. I. agents, after a final warning, gained entrance by removing a panel in the kitchen door and taking another locked door off its hinges. When they started to force a locked bedroom door, Bell opened it and demanded to see search and arrest warrants. The agents presented their credentials and informed Bell of his indictment, the outstanding arrest warrant, and their power to make a search incident to the arrest. Bell, fully dressed, remained

In these circumstances, the district court properly dismissed the case for want of jurisdiction under the powers granted by Section 37 of the Judicial Code, *supra*, p. 2. *Robinson* v. *Ander-*

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in the living room with his wife, while the agents gained entrance to the den through another locked door. The den and certain locked closets contained voluminous papers and documents of "Mankind United" and required considerable time to examine, as well as the assistance of additional F. B. I. agents. Confirming fears that Bell would attempt to destroy evidence, the den was in wild disorder when entered by the agents and photographs were taken of it. Bell voluntarily assisted in examining, marking, listing, and packing the "Mankind United" documents and making an inventory of the documents taken, a procedure which occupied the entire period from 8:10 A. M., the time of arrest, until 1:30 P. M., when the F. B. I. agents and Bell left the apartment. While leaving the apartment at approximately 1:30 P. M., Bell's attorney met the F. B. I. agents and was advised that Bell could be located at the City Prison. One agent filed a complaint with the United States Commissioner at 12:10 P. M. and Bell was booked at 1:50 P. M. Bell was shown courteous treatment at all times and acknowledged it. He never requested to be taken before a committing officer.

The affidavit of respondent Sherman (R. 69–72) in response to that of petitioner Askew, showed that he, another defendant and a matron, went to Mrs. Askew's home in San Diego at 7:30 A. M., December 18, 1942. She was shown credentials and read the warrant for her arrest. She stated that she was ready to go but did not want the premises searched without a warrant. Sherman explained his right to make an incidental search and that he wanted "Mankind United" documents. Mrs. Askew furnished him such "Mankind United" papers as he requested and Sherman gave a receipt for the documents. The search took 30 minutes. Mrs. Askew had breakfast, changed her clothes and was booked at 8:55 A. M., December 18, 1942, at the San Diego county jail, under 50 U. S. C. 33.

son, 121 U. S. 522; *Florida Central and Peninsular Railroad Company* v. *Bell,* 176 U. S. 321, 330; *Bullard* v. *Cisco,* 290 U. S. 179, 187–188; *McNutt* v. *General Motors &c. Corp.,* 298 U. S. 178.[12]

CONCLUSION

The decision below is correct and there is no conflict. We submit that the application for a writ of certiorari should be denied.

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OCTOBER 1945.

[12] Petitioners have ample opportunity, outside of an action for damages, to vindicate their constitutional rights and bring respondents "to account at the bar of justice" (Pet. 22). By the motion to suppress evidence in the criminal case (see p. 5, *supra*) and by the presently pending appeal in that case, in which the alleged false arrests and improper searches form a principal ingredient, petitioners have raised and can obtain a determination of the question whether their constitutional rights have been abridged by improper federal action. Cf. *Burdeau* v. *McDowell,* 256 U. S. 465, 475; *Boyd* v. *United States,* 116 U. S. 616. See also Act of August 27, 1935, c. 740, § 201 (49 Stat. 877, 18 U. S. C. 53a), providing fine and imprisonment for unlawful searches by officers or agents of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 344

ARTHUR L. BELL, ET AL., PETITIONERS

v.

R. B. HOOD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California, Central Division (R. 145–159), is not officially reported. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R. 168–178) is reported in 150 F. 2d 96.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 7, 1945 (R. 179). The petition for a writ of certiorari was filed on August 20, 1945, and was granted October 22, 1945. The

jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the district court erred in dismissing the instant suit on the ground that it does not arise "under the Constitution or laws of the United States" within the meaning of Section 24 (1) of the Judicial Code, 28 U. S. C. § 41 (1).

STATUTES INVOLVED

Section 24 (1) (a) of the Judicial Code, 28 U. S. C. § 41 (1) (a), provides in part:

> The district courts shall have original jurisdiction as follows:
>
> First. Of all suits of a civil nature at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States * * *.

Section 37 of the Judicial Code, 28 U. S. C. § 80, provides in part:

> If in any suit commenced in a district court * * * it shall appear to the satisfaction of the said district court, at any time after such suit has been brought * * *, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, * * * the said district court shall proceed no

further therein, but shall dismiss the suit * * * and shall make such order as to costs as shall be just.

STATEMENT

Following an extensive investigation by the Federal Bureau of Investigation ("F. B. I."), the Federal Grand Jury for the Southern District of California returned a secret indictment (No. 15759) on December 17, 1942, in which the twelve petitioners, leaders and members of a voluntary association known as "Mankind United," were charged with conspiracy to commit sedition, a felony under the Act of June 15, 1917, Sec. 4, 40 Stat. 219, 50 U. S. C. § 34 (R. 4, 6–8, 34). Warrants for the arrest of all the petitioners, to be executed either by the United States Marshal or by F. B. I. agents, were immediately issued on the same day by the United States District Court for the Southern District of California, and were handed to F. B. I. agents in that District for service (R. 35). Petitioners Bell, Burkey, Gloeckler, and Miller resided outside the Southern District of California and, as to them, a return of *non est* was made by the United States Marshal at Los Angeles on the afternoon of December 17, 1942 (R. 4, 7, 35). The United States Attorney then advised the respondent R. B. Hood, F. B. I. Special Agent in Charge in Los Angeles, of the issuance and return of the warrants for the

arrest of petitioners and directed their apprehension, authorizing the arrest of those beyond the Southern District as fugitives for whom warrants were outstanding (R. 35).

Thereupon, the respondent Hood notified the San Francisco office of the F. B. I. by teletype of the indictment, the issuance of the warrants, their delivery to Hood, the returns *non est* as to petitioners Bell, Burkey, Gloeckler, and Miller, and the directions from the United States Attorney for the arrest of petitioners (R. 35–36, 44, 56, 62, 66). In compliance with these directions, F. B. I. agents from the San Francisco office, respondents herein, arrested the four above-named petitioners at San Francisco, Oakland, Denair, and Mountain View, respectively,[1] at approximately 7:30 A. M., December 18, 1942 (R. 44, 56, 62, 66). At the same time, the remaining eight petitioners were arrested by other F. B. I. agents (also respondents herein) at San Diego, Los Angeles, and Fresno, all within the Southern District of California, under the warrants of arrest issued by the district court (R. 69–70, 73, 76, 78–79, 82, 86–87, 89, 93).[2] In connection with each arrest, the arresting agents

[1] All these points are in California, but outside the Southern Judicial District.

[2] The F. B. I. timed all the arrests for 7:30 A. M. on December 18, 1942, in order to avoid the results of premature publicity (R. 86, 94).

searched the premises of each petitioner and took custody of pamphlets, circulars and other property known to such agents to be connected with the affairs of "Mankind United" and the offense charged in the indictment (R. 51–53, 57–59, 64, 68, 70–71, 74–75, 76–77, 79–80, 83, 87, 90–91, 94, 96).

Shortly after these arrests, several of the petitioners made a motion in the criminal case to suppress and return evidence. The motion charged that the Government had violated the Fourth and Fifth Amendments (1) in taking Bell, Burkey, Gloeckler, and Miller into custody without warrants of arrest and without reasonable ground to believe that they had committed a felony and were likely to escape before warrants could be obtained; and (2) in taking "Mankind United" pamphlets and circulars without search warrants. After a full hearing on affidavits and testimony in open court, the motions to suppress were denied on February 13, 1943. *United States* v. *Bell*, 48 F. Supp. 986 (S. D. Cal.). Thereafter, all the petitioners except Gloeckler and Kelso were tried and convicted of conspiracy to commit sedition. Judgment was rendered on May 10, 1943, imposing a fine upon petitioners Askew and Jakeman and sentencing the remaining eight petitioners to imprisonment. An appeal from the convictions is

now pending in the Circuit Court of Appeals for the Ninth Circuit.[3]

On April 7, 1945, all twelve petitioners[4] instituted the present suit against Hood and the other F. B. I. agents who made the arrests on December 18, 1942,[5] charging that the defendants had "unlawfully conspired with each other to act beyond their authority (R. 8)" as F. B. I. agents, and had

> agreed that they would abridge the Constitutional rights of the plaintiffs as guaranteed by the Fourth and Fifth Amendments * * * to be free from the deprivation of liberty and property without due process of law, and to be free from unreasonable searches and seizures, and agreed unlawfully to simultaneously, in the early morning of December 18th, 1942, search the homes of the individual plaintiffs herein without any warrants of search or seizure, and unlawfully to seize the papers, documents and effects of said plaintiffs and of "Mankind United", and falsely to imprison the individual plaintiffs by unlawfully arresting some of the individual plaintiffs without a warrant of arrest and unreason-

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[3] Record on appeal in *Bell et al.* v. *United States*, No. 10432, C. C. A. 9.

[4] Petitioner Bell sued individually and in behalf of "'Mankind United' and The Associates thereof" (R. 2).

[5] Merle Armstrong, a member of the City of Los Angeles Police Force, was also named as a defendant in the complaint (R. 8), but was dropped from the suit in the court below (R. 171; cf. Pet. Br. 8, note 6b).

> ably to delay the taking of all of the individual plaintiffs before a committing officer, in order to effectuate the unlawful searches and seizures aforesaid (R. 9).

The complaint further alleged that in order to carry out this conspiracy, the respondents broke into and entered petitioners' premises; arrested and imprisoned them and failed to take them immediately before a committing officer; arrested four without warrants, in the absence of any reasonable ground to believe them guilty of a Federal felony, or any likelihood that they would escape before a warrant could be obtained; searched their homes without search warrants; and seized and carried away their books, papers and effects (R. 9–24).*

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*The general allegations as to all the petitioners (R. 8-9) were followed by specific allegations as to each one (R. 10–22). The allegations as to petitioner Bell (Division Superintendent of "Mankind United", whose apartment served as the organization's headquarters, R. 4, 10), illustrate those made as to each of the four petitioners apprehended without a warrant of arrest by San Francisco F. B. I. agents: That Bell's residence in San Francisco was broken into on the morning of December 18, 1942, by certain of the respondents without search or arrest warrants; that Bell was placed under arrest and his premises were searched; that he was held in custody at his premises until 2:00 P. M. and then taken before a committing officer; that these respondents, at 2:00 P. M., took from his premises documents and records of "Mankind United" as well as private papers, documents, and cash; and that he was not permitted to see his attorney, to have counsel, or to communicate with anyone (R. 10–12).

For these acts, allegedly committed by respondents "beyond the scope of [their] authority" and in violation of petitioners' rights under the Fourth and Fifth Amendments (R. 10), petitioners demanded damages totalling more than $1,000,000 (R. 24–29).[7] Jurisdiction of the district court was alleged to be founded "upon the Federal question involving the rights of [petitioners] to be free from deprivation of liberty without due process of law by false and unlawful imprisonment; and * * * to be free from unreasonable searches and seizures" (R. 3–4). The same paragraph of the complaint stated that respondents were F. B. I. agents and claim to

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The allegations as to petitioner Askew illustrate those made as to the eight petitioners arrested within the Southern District of California under warrants of arrest: That two of the defendants entered her premises at 7:30 A. M., Friday, December 18, 1942, and falsely imprisoned her thereon, searched the premises against her will and without a search warrant, removed a large number of documents of "Mankind United" as well as private papers and documents, and held her in the San Diego city jail "until noon Saturday," without arraignment or commitment (R. 12).

[7] On account of false imprisonment: $50,000 for Bell, and $20,000 for each of the other petitioners; on account of breaking and entering the premises of each petitioner but Bell, $5,000; on account of searching Bell's home and seizing his books, papers and effects, $5,000; on account of disruption to the business of "Mankind United", $100,000; on account of deprivation of petitioners' constitutional rights, "mental pain and anguish and suffering" and injury to their reputation, $100,000 for Bell and $50,000 for each of the others (R. 24–29).

have acted under 5 U. S. C. 300 and 300a (R. 3–4).[5]

Respondents moved to dismiss the complaint and for summary judgment upon the grounds that (a) the acts were done within the scope of their authority as officers of the United States, and (b) the searches and seizures were incidental to lawful arrests and were valid (R. 31–34, 36–37, 40–41, 42–43, 46). Affidavits were filed by respondents (R. 43–97) and counteraffidavits by some of the petitioners (R. 97–134); and after hearing the motions (R. 156), the court, *sua sponte*, dismissed the suit for want of jurisdiction pursuant to Section 37 of the Judicial Code, 28 U. S. C. 80 (see pp. 2–3, *supra*), holding that the case did not arise under the Constitution or laws of the United States (R. 149–151, 137). The Circuit Court of Appeals affirmed (R. 179).

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[5] 5 U. S. C. 300 authorizes the Attorney General to appoint officers and to vest them with necessary authority "for the detection and prosecution of crimes against the United States." 5 U. S. C. 300a empowers the Director, Assistant Directors, agents, and inspectors of the F. B. I. to serve warrants and subpoenas issued under the authority of the United States; to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer.

SUMMARY OF ARGUMENT

The sole question on the present record is whether the complaint sets up a case which "arises under the Constitution or laws of the United States" within the meaning of Section 24 (1) of the Judicial Code.

We submit that it does not. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action, it must be disclosed upon the face of the complaint, and it is unavailing as a basis of jurisdiction where the asserted right is no part of the plaintiff's case and is alleged simply to anticipate or reply to a probable defense.

Here the cause of action is the established common law tort of trespass to person and property, made actionable in this instance by California law. It is significant that no damages are sought in respect of the conspiracy to commit these torts. Since the constitutional provisions here involved are prohibitions against the federal government, which create no right to money damages, that right rests on the common law concept of unauthorized officials as individual trespassers. The scope of the defendants' statutory authority goes only to the question of justification, and affords no basis of federal jurisdiction. The only federal question here is that pleaded by way of anticipatory replication

to a probable defense. Accordingly, the lower courts have uniformly dismissed cases such as this one for want of federal jurisdiction.

Moreover, the allegations of the complaint negative any controversy between the parties as to the scope of the statutory and constitutional provisions involved. To the extent that a federal question would remain in the record after trial, it would be available for appellate review by this Court, but that circumstance, obviously, does not establish the existence of a federal question for purposes of original federal jurisdiction.

Petitioners' authorities are either cases where the right did not exist at common law and was created by a federal statute, or else, as in suits to enjoin prosecutions under an allegedly invalid statute, clearly involved construction of the constitutional and statutory provisions relied upon. The injunction cases are further distinguishable since the jurisdiction of the federal courts in suits to enjoin a federal officer probably rests on the circumstance that a state court lacks such power, for the same basic reason that it lacks power to issue a mandamus or a habeas corpus to a federal officer.

Petitioners' "Proposed Amended Complaint", first filed in the court below a year after the judgment of dismissal appealed from, is subject to the same objections as the original pleading. The court below did not abuse its discretion in refusing to reverse the judgment of the district

court with directions to that tribunal to give petitioners leave to amend. Indeed, the court below probably lacked power to grant such relief.

The present case could, by appropriate legislation, be brought within the constitutional jurisdiction of the district courts, either by permitting suits of this character to be brought there originally or by authorizing F. B. I. agents to remove cases brought against them. But Congress has not legislated to that effect. Reversal here would not protect F. B. I. agents; they would still be unable to remove where they were sued simply as common law trespassers without mention of their official status. But reversal would have the effect of bringing within the original jurisdiction of the federal courts, and hence allowing the parties to oust the original jurisdiction of the state courts, in all tort actions for false arrest, false imprisonment, and unlawful searches and seizures brought against every state and municipal law enforcement officer in the land. Such a result would follow, in the event of reversal, whenever a plaintiff alleged (instead of violation of the Fourth and Fifth Amendments as here) a violation of the Fourteenth Amendment.

ARGUMENT

The sole question before this Court on the present record is whether the complaint sets up a case which "arises under the Constitution or

laws of the United States." Judicial Code, § 24 (1); 28 U. S. C. § 41 (1).

Petitioners allege that respondents, agents of the Federal Bureau of Investigation conspired to act beyond their statutory authority as such agents and to deprive petitioners of the right guaranteed them by the Fourth Amendment to be free from unreasonable searches and seizures, and of the right guaranteed by the Fifth Amendment to be free from deprivation of liberty without due process of law by false and unlawful imprisonment (R. 3–4, 8–9). The complaint seeks damages for the breaking and entry of private premises, for the seizure of personal effects, and for the arrest and imprisonment of individuals (R. 24–28).

Both courts below held that the complaint failed to state a cause of action within § 24 (1), Judicial Code. We submit that they were right, both on authority of similar decisions elsewhere (*Taylor* v. *DeHart*, 22 F. (2d) 206 (W. D. Mo.); *Viles* v. *Symes*, 129 F. (2d) 828 (C. C. A. 10), certiorari denied, 317 U. S. 633), as well as upon analysis of the complaint against the background of established tests as to what constitutes a case involving a federal question.

I. THE CASE DOES NOT ARISE UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES

Discussion of when a cause "arises under the Constitution or laws of the United States"

within § 24 (1) of the Judicial Code may well commence with *Gully* v. *First National Bank*, 299 U. S. 109, where Mr. Justice Cardozo analyzed the precedents and, speaking for a unanimous Court, said (pp. 113–114):

> Looking backward we can see that the early cases were less exacting than the recent ones in respect of some of these conditions. If a federal right was pleaded, the question was not always asked whether it was likely to be disputed. This is seen particularly in suits by or against a corporation deriving its charter from an act of Congress. *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 817–828; *Pacific Railroad Removal Cases*, 115 U. S. 1, 11. Modern statutes have greatly diminished the importance of those decisions by narrowing their scope. *Gay* v. *Ruff*, 292 U. S. 25, 35; *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 483. Federal incorporation is now abolished as a ground of federal jurisdiction except where the United States holds more than one-half the stock. Act of February 13, 1925, c. 229, § 12, 43 Stat. 936, 941. Partly under the influence of statutes disclosing a new legislative policy, partly under the influence of more liberal decisions, the probable course of the trial, the real substance of the controversy, has taken on a new significance. "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising

> under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." *Shulthis* v. *McDougal*, 225 U. S. 561, 569. *Cf. First National Bank* v. *Williams*, *supra*; *Hopkins* v. *Walker*, 244 U. S. 486, 489; *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 507. Only recently we said after full consideration that the doctrine of the charter cases was to be treated as exceptional, though within their special field there was no thought to disturb them. *Puerto Rico* v. *Russell & Co.*, *supra*. "We should fly in the face of this legislative policy and disregard precedents which we think controlling were we to extend the doctrine now." *Ibid.* Today, even more clearly than in the past, "the federal nature of the right to be established is decisive—not the source of the authority to establish it." *Ibid.*

Accordingly, in the *Gully* case, this Court held that a suit brought by a state tax collector against a national bank for taxes assumed upon acquisition of the property of a predecessor bank did not arise under the laws of the United States simply because it was alleged that the tax would have been void unless permitted by an Act of Congress relative to the taxation of national banks.

A number of tests laid down in the *Gully* case are applicable here. "To bring a case within the

statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully* v. *First National Bank*, *supra*, at 112; *Starin* v. *New York*, 115 U. S. 248, 257; *First National Bank* v. *Williams*, 252 U. S. 504, 512. Stated somewhat differently, the suit must be one "to enforce a right created by a law of the United States." *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 483. Moreover, to sustain federal jurisdiction, the controversy arising under the Constitution or laws of the United States "must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal". *Gully* v. *First Nat. Bank*, 299 U. S. 109, 113; *Walker* v. *Collins*, 167 U. S. 57, 59; *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25; *Taylor* v. *Anderson*, 234 U. S. 74; *Tennessee* v. *Union & Planters Bank*, 152 U. S. 454. And "the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." *Gully* v. *First Nat. Bank*, 299 U. S. 109, 113; *Devine* v. *Los Angeles*, 202 U. S. 313, 334; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25; *Peyton* v. *Railway Express Agency*, 316 U. S. 350, 353.

Measured by these criteria, the court below properly held that there was no original federal jurisdiction in this case.

1. *Analysis of the complaint shows that the right here relied upon is created by state law*

The cause of action alleged in the complaint is the familiar common law tort of trespass to person and property, which has been actionable since at least the turn of the Fourteenth Century.[9] The complaint seeks damages on account of the breaking and entry of private premises, the seizure of personal effects, and the arrest and imprisonment of individuals (R. 24–28), all alleged to be unlawful. The allegations, if proved, would without more establish the common law torts of trespass *quare clausum fregit*, trespass *de bonis asportatis*, and trespass *vi et armis*. 3 Bl. Comm. *151, 208–211; Shipman, *Handbook of Common-Law Pleading* (Ballantine's 3d ed. 1923) § 35. The California Code enacts the same torts in statutory form and provides the right to recover damages. *Calif. Civ. Code* (Deering 1937) § 3281.

The allegations of a conspiracy on the part of the respondents to act beyond their statutory authority and to deprive the petitioners of their constitutional rights (R. 8–9) are no part of the cause of action, and no damages are sought on account of the conspiracy (see R. 24–28). Nor do any of the statutory or constitutional provisions cited

[9] Holdsworth, *History of English Law* (3rd ed. 1923), 364–365; 2 Pollock & Maitland, *History of English Law* (1st ed. 1895), 525–526; Ames, *Lectures on Legal History* (1913), 56; Maitland, *Equity and the Forms of Action* (1932 ed.), 342–344.

in the complaint give rise to a right of action for damages. The Acts of May 14, 1940, 54 Stat. 181, 201, and June 18, 1934, 48 Stat. 1008 (5 U. S. C. §§ 300 and 300a) grant certain powers to federal officers to make arrests and seizures; they do not purport to authorize the recovery of damages at law if those powers are exceeded.[10] This is readily demonstrable by considering the effect of conduct prohibited by the cited statutes, but not constituting a common law tort, such as the unauthorized service of a subpoena or warrant. In such a case, there would be no actionable tort unless the local law recognized such conduct as a tort. For like reasons, an arrest or seizure beyond the statutory authority would be actionable only because those acts would constitute tortious interference with person and property, for which the common law or the state law authorizes recovery.

Similarly, the guarantees of the Fourth and Fifth Amendments, invoked in the complaint, do

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[10] Cf. Act of March 20, 1936, 49 Stat. 1184 (31 U. S. C. § 224b) authorizing the Attorney General to "consider, adjust, and determine" claims up to $500 on account of damage to person or property "caused by the Director, any Assistant Director, inspector, or special agent" of the F. B. I. "acting within the scope of his employment," and to certify the amount found due "to Congress as a legal claim for payment out of appropriations that may be made by Congress therefor." See also Act of December 28, 1922, 42 Stat. 1066 (31 U. S. C. § 215) for a similar general authorization applicable to all departments and establishments (other than the War Department, as to which see Act of July 3, 1943, 57 Stat. 372 (31 U. S. C. § 223b)).

not create a right to money damages for their violation. They are prohibitions against the federal government; they do not create rights against private individuals. *Corrigan* v. *Buckley*, 271 U. S. 323; *Burdeau* v. *McDowell*, 256 U. S. 465, 472, 475. The right to be free from unreasonable searches and seizures is a common law right, *Entick* v. *Carrington*, 19 How. St. Tr. 1029; *Boyd* v. *United States*, 116 U. S. 616, which the Constitution does not create but simply protects from invasion by the general government.

That a damage suit against a federal officer on account of unauthorized conduct is a creature of local and not federal law, is also established by the cases involving the question of whether the sovereign immunity prohibits suits against government officers principally based upon acts committed in their official capacity. Where suits to obtain an injunction or judgment for damages against an officer have been held not to be barred by the sovereign's immunity, it has normally been upon the theory that the defendants are sued as individual trespassers for conduct which would be tortious if done by private persons. Cf. *Ex Parte Young*, 209 U. S. 123; *United States* v. *Lee*, 106 U. S. 196; *Poindexter* v. *Greenhow*, 114 U. S. 270, 288–290. Here also, the theory of petitioners' suit is that respondents must be treated as individual trespassers, as answerable as though they were not acting for the Government.

and that their cloak of official immunity has been stripped from them because they have exceeded statutory and constitutional bounds. For such a cause of action, the state law must necessarily be invoked. Indeed, the traditional common law remedy against public officers charged with making unlawful arrests, searches and seizures, is a suit to recover damages from them as individual trespassers under the local law. *Day* v. *Gallup*, 2 Wall. 97; *Buck* v. *Colbath*, 3 Wall. 334, 347; *Boyd* v. *United States*, 116 U. S. 616, 625–628; *Walker* v. *Collins*, 167 U. S. 57; Throop, *Public Officers* (1892) § 724; Mechem, *Public Officers* (1890) § 770, 778; cf. *Freeman* v. *Howe*, 24 How. 450.

Petitioners' cases are not to the contrary. They involve, for the most part, cases asserting rights which were created by federal law. Thus, *Bellknap* v. *Schild*, 161 U. S. 10 (Pet. Br. 13), and *Cammeyer* v. *Newton*, 94 U. S. 225 (Pet. Br. 14), were actions for patent infringement. *Little* v. *Barreme*, 2 Cranch 170 (Pet. Br. 13), was a libel in admiralty seeking a forfeiture. The right asserted in *Tunstall* v. *Brotherhood*, 323 U. S. 210 (Pet. Br. 11), was one which did not exist at common law, *viz.*, the plaintiff's right, created by the Railway Labor Act, of being represented by the defendant brotherhood for purposes of collective bargaining. In like manner, the right asserted in *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 (Pet. Br. 14–15) to have

mail delivered by the Postmaster General, in *Waite* v. *Macy*, 246 U. S. 606 (Pet. Br. 14), to have tea passed through the customs without interference from the Board of Tea Appeals, and in *Perkins* v. *Elg*, 307 U. S. 325 (Pet. Br. 15), to be issued a passport, were rights created by federal statute and not grounded on common law.

Bock v. *Perkins*, 139 U. S. 628 (Pet. Br. 14), was a suit against a United States marshal arising out of his acts as such. This Court held that the case arose under the laws of the United States since (139 U. S. at 630) "for any failure in * * * regard [to his duties] he would be liable to suit by any one thereby injured. Rev. Stat. § 784." *Howard* v. *United States*, 184 U. S. 676 (Pet. Br. 14) was a suit brought on the bond of a clerk of a United States court. This Court upheld federal jurisdiction by analogy to the cases involving suits on marshals' bonds. In *Rogers* v. *The Marshal*, 1 Wall. 644 (Pet. Br. 14), the jurisdictional problem does not appear to have been raised. But the case involved a suit on a marshal's bond, and hence presumably fell within the purview of R. S. 784. Where, however, the marshal is sued in tort, it is clear that the cause is held not to arise under the Constitution or laws of the United States. See *Walker* v. *Collins*, 167 U. S. 57, discussed below, p. 24.

The other cases cited by petitioners are clearly out of point, as they arose either on diversity of

citizenship,[11] or else came within the federal jurisdiction by virtue of a special removal statute,[12] or else were brought under the general equitable jurisdiction of the District of Columbia courts.[13] Certain other injunction cases are further discussed and distinguished below, pp. 30–38.

2. *The scope of defendants' statutory authority goes only to the question of justification*

The scope of statutory or constitutional limits upon the authority of an officer sued for a trespass is of course frequently pertinent, but as a matter of accurate analysis it is no part of the cause of action but arises only defensively, when the officer seeks to justify conduct which but for his official authority would be tortious.

Thus, in the historic case of *Entick* v. *Carrington, supra,* where an action of trespass was brought against government officers for entering the plaintiff's dwelling house, breaking open his desks and boxes, and searching and examining

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[11] *Mitchell* v. *Harmony*, 13 How. 115, Pet. Br. 13 (see 13 How. at 136–137); *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, Pet. Br. 12 (see 317 U. S. at 173–174). The language from the latter case quoted in Pet. Br. 12–13 considered, not whether the district court had original jurisdiction, but whether the state or federal rule as to estoppel should be controlling in a suit on a license agreement by a patent licensee.

[12] *Tracy* v. *Swartwout*, 10 Pet. 80, Pet. Br. 13, removed under the "Force Act" provision for the protection of revenue officers, now § 33, Judicial Code, 28 U. S. C. § 76.

[13] *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, Pet. Br. 14; *Perkins* v. *Elg*, 307 U. S. 325, Pet. Br. 15.

his papers, the defendants set up as justification that they had acted under a general search warrant issued in a case of seditious libel. Lord Camden characterized the cause of action and the defense as follows (19 How. St. Tr. at 1066):

> * * * By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant and the plaintiff must have judgment.
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> According to this reasoning, it is now incumbent upon the defendants to shew the law, by which this seizure is warranted. If that cannot be done, it is a trespass.[14]

[14] See also *Boyd* v. *United States*, 116 U. S. 616, 625–626, referring to the celebrated action of trespass by John Wilkes arising out of the search and seizure of Wilkes' papers by authority of a warrant issued by a Secretary of State.

Similarly, in *Walker* v. *Collins*, 167 U. S. 57, an action to recover damages for unlawful seizure of property was brought in a state court, and the defense was that the defendants were acting as United States marshals and deputies, under an order of attachment issued by a federal court. The defendants thereafter removed the cause to the federal court "upon the ground that the action and the defence thereto arose under the laws of the United States" (167 U. S. at 57–58), but the plaintiff recovered judgment on the merits. On a writ of error this Court held that the cause was improperly removed because "in the complaint * * * there are no facts averred showing that the controversy was one arising under the laws of the United States, and it was not essential to the statement of the cause of action that such facts should be averred" (*Id.* at 59).[15]

3. *A case does not involve a federal question when that question is alleged as an anticipatory replication to a probable defense*

The nature of the present cause of action as a trespass unauthorized by law is not altered because the plaintiffs saw fit to anticipate the defense that the defendants acted under official authority, and to reply thereto by charging that

[15] The Court there cited and relied upon *Chappell* v. *Waterworth*, 155 U. S. 102, 108, which held that an ejectment suit in a state court was improperly removed to the federal court upon the defendant's petition that he was holding possession under the authority of the United States.

the acts were unauthorized by statute or the Constitution. Not only must the elements of Federal jurisdiction "be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal", but "the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense" (*Gully* v. *First Nat. Bank*, 299 U. S. 109, 113, and cases cited; see also *Peyton* v. *Railway Express Agency*, 316 U. S. 350, 353).

Stated somewhat differently, petitioners may not invoke federal jurisdiction by stating a defense which the respondents "might possibly set up and then attempt to reply to such defence, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case." *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 153; *Boston & Mont. Consol. C. & S. M. Co.* v. *Montana Ore Purch. Co.*, 188 U. S. 632, 638–639. It is immaterial that the new Federal Rules of Civil Procedure may permit the plaintiff to include in his complaint an anticipatory replication to a probable defense (*e. g.*, Rule 8 (c)), for the rules were not intended to enlarge the statutory jurisdiction of the district courts.[16]

[16] "These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein." Rule 82; see Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. § 723b; *United States* v. *Sherwood*, 312 U. S. 584.

4. *The decision below is in accord with rulings in other circuits*

The lower federal courts have accordingly uniformly declined to take jurisdiction over damage suits against federal officers, even after the new Federal Rules, although violations of a federal statute or a constitutional provision were alleged in the complaint.

In *Viles* v. *Symes*, 129 F. (2d) 828 (C. C. A. 10), certiorari denied, 317 U. S. 633, rehearing denied, 317 U. S. 711, an action in the federal court was brought against the United States attorney, the United States district judge, and others, to recover damages for malicious prosecution and false imprisonment, growing out of a criminal proceeding against plaintiff under the bankruptcy laws. The complaint asserted that the action arose under the First, Fifth, and Sixth Amendments to the Constitution, and a federal statute relating to the allowance of bail (R. S. 1015, 18 U. S. C. 596). The substance of the complaint, strikingly similar to the one at bar, charged that the defendants had conspired to obtain, and had obtained, the plaintiff's indictment, conviction, sentence, and imprisonment, by false testimony and with knowledge that the plaintiff was innocent. The complaint further charged that after the indictment, the plaintiff was arrested at San Francisco and illegally imprisoned for 24 hours pending bail, which he was then required to make at a cost of $200; and that after

his conviction he was committed by the defendant, the district judge, to a psychopathic hospital without a hearing and deprived of liberty without due process of law for several months. Damages were sought in the amount of $200,000.

The Circuit Court of Appeals held that plaintiffs' "right to recover has its genesis and is governed by the local law of the forum"; and that while the Constitution protects the plaintiffs' "right to due process of law and to a speedy, fair and impartial trial * * * these rights as here asserted lurk in the background of his suit, and do not, in these circumstances, confer jurisdiction upon the courts of the United States" (129 F. 2d at 830–831).

For the same reasons, the court below was correct in treating as "allegations of probable defenses" (R. 178) the averments in the present complaint (R. 4) that respondents "claim to have acted under and by virtue of" 5 U. S. C. 300 and 300a, and that their conduct violated petitioners' rights under the Fourth and Fifth Amendments (R. 3, 9). These averments did not alter the essential character of petitioners' cause of action as an alleged trespass to person and property, for which the right to damages is afforded by local and not federal law. The complaint presents simply another instance of a pleader's device to confer federal jurisdiction where none exists. See Dobie, *Federal Procedure* (1928) § 85, p. 336.

A very similar situation was presented in *Taylor* v. *De Hart*, 22 F. 2d 206 (W. D. Mo.), appeal dismissed for want of jurisdiction, 274 U. S. 726. There the plaintiff brought an action at law for damages, alleging that the defendants, under color of their several offices as prohibition agents, conspired to search, and actually did search, his residence without a lawful search warrant, and therefore in violation of the Fourth Amendment and also in violation of the federal Prohibition Act.

The court held that this pleading did not bring the action within § 24 (1), Judicial Code, saying (22 F. 2d at 207–208):

> It will be noted from the petition challenged in the instant case that the right to recover does not depend upon the *construction* of the Fourth Amendment or upon the question of its *application*, and the same is true with respect to the federal Prohibition Law. The *application* and the *construction* of the Fourth Amendment and the federal Prohibition Act are not in controversy.
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> * * * * *
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> The scope and effect of the Fourth Amendment and the federal Prohibition Act are not brought in question. Plaintiff asserts the violation of a well-known right vouchsafed to him unequivocally under said constitutional provision and statutes.
>
> * * * * *

> There is no such controversy [in regard to the operation and effect of the Constitution] here. The operation and effect of the constitutional provision relied upon, as well as the federal Prohibition Act, are well known and undisputed. * * * *

In the case at bar, similarly, the allegations of the complaint negative any dispute or controversy respecting the validity, construction or effect of either the Fourth or Fifth Amendments or of 5 U. S. C. §§ 300 and 300a. It is alleged that the defendants "unlawfully conspired with each other to act beyond their authority as said Federal Bureau of Investigation agents * * * and agreed that they would abridge the Constitutional rights of the plaintiffs as guaranteed by the Fourth and Fifth Amendments * * *" (R. 8–9). That is to say, the complaint suggests that there was no difference between the parties as to the scope of the defendants' official authority or the scope of the plaintiff's constitutional rights; it alleges that defendants conspired to act beyond any possible limit of their authority and to invade the admitted boundaries of plaintiffs' immunities. The present case accordingly did not, on the face of the complaint, require the district court to construe either the statutes or the constitutional provisions referred to; and the court below so held (R. 174).

Petitioners now, as they admit in their brief, have pending an action against respondents in

the California state courts seeking damages for the very cause of action here in suit.[17] To the extent which, after the factual issues there have been sifted out and determined at the trial, a federal question remains in the record, it is available for ultimate review here. But of course the presence of a federal question for purposes of appellate review in this Court by no means establishes the presence of a federal question for purposes of original jurisdiction in the federal district courts. See *New Orleans* v. *Benjamin*, 153 U. S. 411; *Joy* v. *St. Louis*, 201 U. S. 332.

5. *The injunction cases are distinguishable on several grounds.*

There is nothing in the foregoing reasoning contrary to what is decided in the remaining injunction cases relied upon by petitioners,[18] which involve suits to enjoin enforcement of statutes or regulations on the ground of invalidity, constitutional or otherwise. This includes cases such as *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (Pet. Br. 15), and would include *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (Pet. Br. 14) if the Secretary of War in that case had been sued elsewhere than in the District of Columbia.

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[17] While the claim for damages for unlawful imprisonment has been dismissed under the statute of limitations (Pet. Br. 19, n. 13), the remainder of the claims were held not to be barred, and are awaiting trial on the merits.

[18] See pp. 20–22, *supra*, for a discussion of petitioners' other authorities.

We submit that the true ground of distinction is that in the cited cases the prayer for an injunction against the institution of criminal prosecutions for violation of the statutes assailed as unconstitutional or otherwise invalid made those cases necessarily proceedings arising under the Constitution or laws of the United States, whereas in tort actions the statute is measurably farther in the background. In the first class of cases, the proceeding—whatever the juristic device employed to surmount the barrier of sovereign immunity—is really directed against the statute; in the second it is the individuals who are the objects of suit, as damages are alleged. In the first class of cases the controversy would evaporate were the statute out of the way, in the second there would still be a tort action regardless of the statute. The difference may be one of degree, but it is none the less workable for all that. As Mr. Justice Cardozo said of this problem in *Gully* v. *First Nat. Bank*, 299 U. S. 109, 117–118, 118,

> What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. * * * Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation,

> so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

An analogous distinction is that used in determining when a suit for injunction against state action shall be heard by a district court of three judges under § 266 Judicial Code, 28 U. S. C. § 380. Where it is the enforcement of a state statute or regulation which is sought to be enjoined, three judges must be convened. E. g., *Sterling* v. *Constantin*, 287 U. S. 378. But where the conduct from which relief is sought is not such as the state law could be reasonably construed to authorize, then the cause must be heard before a single judge. *Phillips* v. *United States*, 312 U. S. 246. The same practical exercise of judgment in the present situation distinguishes the suits to enjoin prosecutions on the ground of infirmity in the controlling statute from actions for damages for tort where the statute is available

only defensively or where the constitutional provision in question enters the case only by way of replication.

The injunction cases are also distinguishable because, by analogy to the rule that state courts may not mandamus federal officers or issue writs of habeas corpus to inquire into the detention of persons in their custody, state courts are similarly without power to enjoin a federal officer. That being so, the only forum for such suits is in a federal court.[29]

While the precise question of the lack of power of state courts to enjoin a federal officer seems never to have been considered by this Court, we think that such lack of power is clearly established upon consideration of analogous principles and of the fundamental relationship between the states and the Nation.

It has long been settled law that the process of a state court could not issue to interfere with the prosecution of suits in the federal courts or with the execution of judgments of federal courts.[30]

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[29] We have not otherwise distinguished *Goltra* v. *Weeks*, 271 U. S. 536, Pet. Br. 14, where the question of jurisdiction (apart from the suit against the United States aspect) was neither argued by counsel nor considered by the Court.

[30] Cf. *Brooks* v. *Dewar*, 313 U. S. 354, 359.

[31] *McKim* v. *Voorhies*, 7 Cranch 279; *Freeman* v. *Howe*, 24 How. 450; *Riggs* v. *Johnson County*, 6 Wall. 166; *United States* v. *Council of Keokuk*, 6 Wall. 514.

After preliminary uncertainty,[22] this Court settled that both the judicial and the executive branches of the Government were to be protected against interference from state courts, when the interference takes the form of a writ of habeas corpus. *Ableman* v. *Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397; see *Robb* v. *Connolly*, 111 U. S. 624, 639; *Ex parte Royall*, 117 U. S. 241, 249. In *Tarble's Case*, the Court explained the reason for the rule (13 Wall. at 409):

> It is manifest that the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty.

This policy applies equally, if not *a fortiori*, to the direct interference with federal functions which arises when the state court issues an injunction against the federal officer. If it is necessary for the Federal Government to have an unrestrained custody of its prisoners, it would seem an equal necessity that its functions be performed without interference by a state court decree.

Issuance of an injunction by a state court against a federal officer would seem also to be a consequence of the settled principle that a state court is without power to issue writs of mandamus to fed-

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[22] Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 353–357.

eral officials. *McClung* v. *Silliman*, 6 Wheat. 598; *Ex parte Shockley*, 17 F. (2d) 133 (N. D. Ohio); cf. *Boske* v. *Comingore*, 177 U. S. 459. The writs of mandamus and injunction differ only in form so far as this issue is concerned; each is an undertaking by a state court to control the performance of federal duties.

The Court in *Keely* v. *Sanders*, 99 U. S. 441, made it plain that the principle of the habeas corpus and the mandamus cases would apply equally to injunctions. There the Court declared (99 U. S. at 443):

> No State court could, by injunction or otherwise, prevent Federal officers from collecting Federal taxes. The government of the United States, within its sphere, is independent of State action.

While it is possible to distinguish the *Keely* case upon the traditional reluctance to restrain the collection of federal taxes, its statement is cast in terms of a principle of general application.

The state courts, so far as they have considered this question, seem generally to have ruled that they were without power to control a federal official, whether by writ of mandamus or by injunction. *Parry* v. *Delaney*, 310 Mass. 107, 37 N. E. 2d 249 (Pet. Br. 22); *Brewer* v. *Kidd*, 23 Mich. 440; *Hinkle* v. *Town of Franklin*, 118 W. Va. 585, 191 S. E. 291; *Goldstein* v. *Sommervell*, 170 Misc. 602, 10 N. Y. Supp. (2d) 747; see *Mallory* v.

Wheeler, 151 Wis. 136, 138 N. W. 97; see also, *In re Turner*, 119 Fed. 231 (C. C., S. D. Iowa).

On authority of the habeas corpus cases, Charles Warren has categorically stated[23] that "it has been conclusively determined that the state courts possess no power to enjoin a federal official * * *." Another commentator[24] has similarly read these cases:

> No State can lawfully do an act which will suspend even for a moment the machinery of the national government * * *. This is fundamental in our duplex system of government, in which the constitution and laws of the United States and treaties made under its authority are the supreme law of the land.

Dicta in the decision of this Court point to the same result. *Tennessee* v. *Davis*, 100 U. S. 257, 262–263; *In re Neagle*, 135 U. S. 1, 61–62.

It might be argued that this analysis is merely a rephrasing of the rule that a suit against federal officers amounts in many instances to a suit against the United States; that, if the federal official is acting without proper authority, whether in the statute or in the Constitution, he acts only as an individual and not as an official; and hence

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[23] Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 358.

[24] Bishop, *Judicial Control of Federal Officers*, 9 Col. L. Rev. 397, 407. See also, *Power of a State Court to Enjoin N. L. R. B. Officials*, 36 Mich. L. Rev. 1344, 1347–1351.

that the federal officer may be brought before a state court upon a prayer for an injunction against him as an individual if only the complaint alleges that he is acting without proper authority. The same contention, however, has been made and has been rejected in the habeas corpus cases. *Tarble's Case*, 13 Wall. 397, 410–411. If allegations that the federal officer is acting without authority give to the state courts no power to determine whether or not a writ of habeas corpus should issue, similar allegations should correlatively confer upon the state courts no power to determine whether to issue a writ of injunction.

We have found no case in which a state court has been held, after consideration of this argument, authorized to enjoin a federal official.[25]

[25] In *Stanley* v. *Schwalby*, 162 U. S. 255, the Court ordered an action of trespass to try title, brought in the state courts against army officers, to be dismissed on the merits. And in *Scranton* v. *Wheeler*, 179 U. S. 141, the Court considered on the merits an action of ejectment brought in a state court against the federal officer in charge. In neither case did the Court consider the power of the state courts to entertain these actions, which would be followed by compulsory process akin to the decree of injunction, and in neither case did it affirm the decision on the merits. Again, in *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135, and in *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163, the Court reversed on the merits mandamus and injunction actions against federally controlled carriers which had been brought in the state courts. But these cases are properly to be explained on the ground of the statutory waiver of immunity. See section 10 of the Act of March 21, 1918, c. 25, 40 Stat. 451, 456.

Consequently the circumstance that suits for injunctions against federal officials are entertained in federal courts by no means establishes that an action at law seeking damages against such officers involves a federal question without more.

II. THE COURT BELOW DID NOT ERR IN REFUSING TO INSTRUCT THE DISTRICT COURT TO PERMIT THE FILING OF AN AMENDED COMPLAINT WHICH WAS SUBJECT TO THE SAME OBJECTIONS AS THE ORIGINAL

As before noted, petitioners' complaint in the district court charged a conspiracy among respondents to make unlawful arrests, imprisonments, and searches and seizures (R. 8-9, *et seq.*). This complaint was dismissed on April 24, 1944 (R. 137); petitioners appealed on April 28, 1944 (R. 138); and the appeal was argued in the court below on March 22, 1945 (R. 163). Thereafter, on April 30, 1945, while the appeal was under advisement, petitioners submitted in the court below a "Proposed Amended Complaint for Damages for False Imprisonment and Unlawful Search and Seizure by Federal Officers", together with a "Motion to Reverse Judgment, with Instructions" to the district court to grant leave to file the amended complaint (R. 181, 186). Petitioners

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An early decision, decided long before the habeas corpus cases, held that an action of replevin against property held by a federal officer would lie in a state court. *Slocum* v. *Mayberry*, 2 Wheat. 1. It seems equally applicable to a bill for an injunction, but cannot be considered controlling at this date.

contend that the "Proposed Amended Complaint" eliminates the recital of conspiracy (Pet. Br. 16–17). However, neither decision below was grounded on any technical point of pleading, and the court below, although it denied petitioners' motion to file the amended complaint (R. 178–179), characterized the allegations of the original complaint as charging "that defendants, through the medium of unlawful and unreasonable searches and seizures, have violated" plaintiffs' rights under the Fourth and Fifth Amendments (R. 170). In point of fact, the "Proposed Amended Complaint" does not entirely eliminate the allegation of conspiracy (R. 190, par. VIII), and merely restates the allegations of the original complaint in argumentative style. It is in consequence subject to all the jurisdictional infirmities of the original pleading.

Moreover, the court below clearly did not abuse its discretion in denying the motion to reverse, which was filed a year after the original complaint was dismissed, and over a month after the argument on appeal. *Cf.* Rule 15 (a), F. R. Civ. P. This was long after the expiration of the six-months' period allowed for relieving a party from "a judgment * * * taken against him through his mistake, inadvertence, surprise, or excusable neglect." Rule 60 (b), F. R. Civ. P. Indeed, not only was the action of the court below denying the motion a proper exercise of discre-

tion, but to have granted the motion would in all likelihood have been beyond the power of a circuit court of appeals. See *United States* v. *Newberry Mfg. Co.*, 123 F. (2d) 453, a decision in the First Circuit squarely in point on this phase of the case.

III. CONGRESS HAS NOT CONFERRED JURISDICTION OF CASES SUCH AS THIS ONE ON THE FEDERAL COURTS

It is axiomatic that the federal courts have only such part of their constitutional grant of jurisdiction as Congress has seen fit to confer upon them, and that in recent years the jurisdiction has been narrowed legislatively rather than widened. See *Gay* v. *Ruff*, 292 U. S. 25, 35–37; *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 485; *Gully* v. *First Nat. Bank*, 299 U. S. 109, 113–114; *St. Paul Indemnity Co.* v. *Cab Co.*, 303 U. S. 283, 288.

Undoubtedly, Congress could constitutionally bring a case such as this one within the constitutional jurisdiction of the federal district courts. It has already conferred upon such courts jurisdiction of suits at law or in equity authorized to be brought by any person to redress the deprivation, under color of *state* law, of any right, privilege, or immunity conferred by the Constitution. Section 24 (14), Judicial Code, 28 U. S. C. § 41 (14). It could similarly confer jurisdiction of like actions brought to redress such deprivations under color of *federal* law or authority—but it has not done so.

Just as the original jurisdiction of the district courts could be extended, so also could Congress enlarge the categories of those officers entitled to remove to a federal court proceedings brought against them by reason of acts done under color of their official authority. Such removals are presently limited to revenue officers, officers of United States courts, and officers of either House of Congress (see § 33, Judicial Code, 28 U. S. C. § 76), and to persons in the military service of the United States. 117th Article of War, 10 U. S. C. § 1589. Congress clearly has the power to confer upon all federal law enforcement officers, or upon only a limited class of them such as agents of the Federal Bureau of Investigation, the same rights of removal as are now available to revenue officers. Here again, Congress has not seen fit to take the additional step.

The questions of policy and convenience implicit in amendments to the Judicial Code such as those suggested above are for the legislature. It is sufficient for present purposes that Congress has not up to now so broadened the scope of the federal judicial power.

Acquiescence in the rule for which petitioners are contending would not in any sense establish the right of F. B. I. agents to be sued solely in the federal courts. For if petitioners' complaint had been silent on the Constitution and had been framed simply as a tort action against individual

trespassers, respondents would not have been able to remove the cause by virtue of allegations that they had been acting as federal officers. *Chappell* v. *Waterworth*, 155 U. S. 102; *Walker* v. *Collins*, 167 U. S. 57; *Chaskin* v. *Thompson*, 143 F. (2d) 566 (C. C. A. 9). Consequently, from the point of view of protecting F. B. I. agents, of affording them at all times a federal forum in the event of suit, reversal here would simply mean that whether or not such agents could remain in the federal courts would depend entirely upon the option of the plaintiff's pleader.

Conversely, from the point of view of the distribution of judicial power between the state and federal courts, reversal would mean that all actions for false imprisonment and the like against any state law enforcement officer in the land, be he the humblest of village constables, could be brought within the original jurisdiction of the federal courts whenever the plaintiff's lawyer alleged action amounting to a deprivation of liberty without due process of law and cited the Constitution. What is here pleaded as action in violation of the Fifth Amendment could be alleged there as violative of the Fourteenth. The consequence would be an effective ouster of state court jurisdiction over actions seeking damages for lawless law enforcement brought against any and all state or municipal law enforcement officers.

To accede to petitioners' contentions here, therefore, would mean that the jurisdiction of the federal courts would be extended far beyond the limits now established by Congress and by the decisions of the courts, and in a way certain to disturb the relationship of the states to the Nation.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should be affirmed.

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In the Supreme Court of the United States

OCT 5 1945

OCTOBER TERM, 1945

No. 344

ARTHUR L. BELL, Individually, and as an Associate of and Division Superintendent of "Mankind United", a voluntary association, for and in behalf of said "Mankind United" and the Associates thereof; MAUDE ASKEW, EUGENE WADSWORTH BROWN, J. FRED BURKEY, LAWRENCE COOK, A. RAY ELSEA, JACOB GLOCKLER, BAY BURNS SHARP, SHANNA JAKEMAN, PAULINE KELSO, MAX THEODORE MILLER and HOMER G. WILCOX, *Petitioners*,

vs.

R. B. HOOD, THEODORE CRUISE, PHILIP BOWSER, GEORGE M. LANGDON, WILLIAM GIBSON, EUGENE GREER, J. H. ANGELL, J. SECRIST, JOHN ROCHE, MALCOM C. POWRIE, CECIL C. HUMPHREYS, A. F. SCHEIMERHORN, WILLIAM BRANIGAN, JOHN DOE WOLFE, DON C. SWANSON, CARL B. SHERMAN, EARL K. ADAMS, HOWARD H. DAVIS, ROBERT T. PUGH, EDWARD A. EURBUSH, O. WILSON FARRELL, DENNIS G. SMITH, HERBERT J. NUBLISH, ROBERT O'KEEFE, EARL P. STATEN, ROBERT MONTGOMERY, NEWELL WILLIAMS, RICHARD DOE DEVINE, RICHARD DOE BULLFRASS, JOHN C. NORRIS, WALT BUTLER, MIKE CASSIDY, PAUL J. O'FARRELL, JOHN W. SCHALLER, LOUIS D. WINE, MERLE ARMSTRONG, JOHN PHILIP MANTON and FRANCES JOHN GOOD, *Respondents*.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF NORTHERN AND SOUTHERN CALIFORNIA BRANCHES OF THE AMERICAN CIVIL LIBERTIES UNION, AMICI CURIAE.

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On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF NORTHERN AND SOUTHERN CALIFORNIA BRANCHES OF THE AMERICAN CIVIL LIBERTIES UNION, AMICI CURIAE.

QUESTION PRESENTED.

Did the District Court below have jurisdiction to entertain petitioners' damage suit for an infringement of their constitutional rights brought against federal officers who, under a claim of statutory authority, acted in excess of their actual authority but, in the course of their employment and in furtherance of the official purposes of the bureau they serve in abridging those rights?

NATURE OF CASE.

The complaint alleges the defendants were federal officers who, pursuant to a conspiracy so to do, violated the basic civil rights and liberties of the citizen plaintiffs guaranteed by the Constitution. It alleges that although these officers acted "beyond their authority" (par. IX of Complaint, R. vol. 1, p. 8) they acted under a claim of federal authority. (See par. 1 of the complaint where it is alleged they claimed "to have acted under and by virtue of the provisions of Sections 299 and 300a of Title 5, U. S. Code".) Consequently, the tenor of the complaint is that although they exceeded their authority they nevertheless did what they did in the course of their employment and in furtherance of the purposes of the federal bureau they serve. The acts complained of were the forcible seizure of the persons of petitioners and of their properties. The seizure of the persons was to exact oral evidence from them and the seizure of their properties was to obtain documentary evidence. The petitioners were awaiting

trial upon an indictment charging them with a federal offense at the time. The officers abridged the petitioners' rights safeguarded by the 4th and 5th Amendments by illegally exacting and obtaining the said evidence for the purpose of using it against the petitioners at the criminal trial which was scheduled to be heard. The complaint seeks damages from the defendants. The District Court below dismissed the cause on its own motion for what it deemed was a want of jurisdiction. The Circuit Court below affirmed the dismissal for what it also viewed as not presenting a substantial federal question.

THE AGENTS ACTED IN FURTHERANCE OF OFFICIAL PURPOSES.

Under the law of agency the master or principal is responsible for the acts of his agents which exceed their actual authority or deviate from the ordinary course of their employment so long as their acts are in furtherance of the master's business or purposes. (See *Garretzen v. Duenckel*, 50 Mo. 104, 11 Amer. Rep. 405, the leading case on the subject and announcing the doctrine, and 3 *C. J. S.*, p. 187, Sec. 255.) So likewise are the agents liable for their torts so committed. (See 3 *C. J. S.*, p. 129, Sec. 20, and cases there cited.) It is settled that persons injured by agents so acting may hold both the principal and agents responsible or, at their election, sue either for damages. Consequently, if the government as the master or principal had been made a proper party defendant in the cause below no

question of jurisdiction would have arisen for no Court other than a Federal Court has jurisdiction over the federal government. In such a case the respondents herein probably would concede the jurisdiction of the Court below. If the District Court would have had jurisdiction to entertain a suit for damages against the master it follows it likewise would have had jurisdiction over the servants.

THE DISTRICT COURT HAD IMPLIED AND EXPRESS JURISDICTION.

The judicial power of the federal government extends to all cases, in law and equity, arising under the Constitution and laws of the United States. (U. S. *Constitution*, Art. I, Sec. 2.) The vesture of judicial power in the Supreme Court and in such inferior Courts as Congress has established under Article III vested in these Courts such express and implied judicial power, within the federal field, as was essential to their functions and operations, consequently, the substratum of common law was included in the grant. Without congressional legislation setting up limits to their respective fields of operation these Courts would function as common law Courts in their field. Beyond the boundaries marked out by Congress these inferior Courts may not trespass but within that field they exercise whatever jurisdiction, express and implied, the Constitution grants or Congress has allotted to them.

The Constitution does not exclude the District Courts from taking jurisdiction of tort actions brought against federal officers for violation of its provisions. We assert this jurisdiction resides in them by express grant and also by implication under the constitutional grant of power. Congress has not prevented these Courts from exercising this jurisdiction. It could have excluded them from entertaining such suits had it expressed such an intention. It could have lodged this jurisdiction in other tribunals or withheld it from any Court save the Supreme Court. It has not seen fit to do this. Instead, and following the constitutional objective, it enacted 28 U.S.C.A., Section 41(1), wherein it gave a general grant of original jurisdiction to the District Courts in all cases arising "under the Constitution or laws of the United States". This statute, we contend, expressly gave jurisdiction over the cause to the District Court below.

This general grant includes jurisdiction over tort actions involving a deprivation of constitutional rights. The fact that Congress has not, in precisely worded legislation, particularly set forth that the District Courts shall assume jurisdiction in tort actions commenced against federal officers does not divest them of jurisdiction. The fact that it has expressly stated that jurisdiction may be exercised by these Courts in certain types of cases, for instance, those specified in 28 U.S.C.A., Sections 41(2) to 41(28), removes doubt on a few matters of which they may take jurisdiction. However, it is no argument against their exercising jurisdiction in tort and other cases not mentioned

therein. Impliedly, under the constitutional grant of power, and expressly, thereunder and under 28 U.S.C.A., Section 41(1), the District Courts would seem to have jurisdiction to entertain damage suits for the torts of federal officers committed against federal law. Especially must this be true where, in furtherance of federal purposes, the officers, in their eagerness to serve their bureau, overstep their authority and act injudiciously. Such suits necessarily arise "under the Constitution or laws of the United States" and not elsewhere. In the instant case the federal question does not lurk in the background: it looms in the foreground.

THE SOVEREIGN GUARANTEEING RIGHTS IS NECESSARILY BOUND TO PROTECT THOSE RIGHTS.

It would appear to be axiomatic that the judicial procedure for the redress of injury inheres in the sovereign that guarantees the stated rights of which injured persons have been deprived. The constitutional grant of power to the judicial branch of government carried with it the implied power to redress wrongs arising thereunder pursuant to common law principle and practice. Actions in trespass would lie at common law in the forum of the sovereign for violations of the type of fundamental rights involved in the instant suit as also would actions in case and in special assumpsit. Congress has not prohibited the District Courts from assuming jurisdiction in tort actions and it has not delegated jurisdiction to State Courts to entertain suits for violations of constitutional rights. A State,

in pursuing its own or the federal design, may give a cause of action in its own forum for damages suffered by a citizen by reason of the wrongful deprivation of his federal guaranties. It is not compelled to do so. A federal officer while in the furtherance of what he determines is his master's business can not be held responsible by a State which may view his acts in another light. See *In re Neagle*, 135 U. S. 1. This Court upholds such acts and thus protects the federal government from outside interference which might arrest its progress. If an agent of the federal government is protected by the shield of the Constitution in such a case can it be said that its sword cannot protect a citizen against invasion of the rights it expressly guarantees? Why should the federal government shirk its duty by closing its doors to those whose federal rights are violated? Is it powerless to preserve the very substantial rights it is supposed to safeguard to citizens?

It would seem that the Federal Courts, pursuant to the constitutional grant and the provisions of 28 U.S. C.A., Section 41(1), would have jurisdiction herein under the language of *Ames v. Kansas*, 111 U. S. 449, at 470. There this Court, in holding the District Court had jurisdiction over an action commenced by a State in its own tribunal, laid down a test for federal jurisdiction in the following words:

> "* * * if that violation may be such as essentially to affect the Constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted

> from that provision which expressly extends the judicial power of the Union to *all* cases arising under the Constitution and laws? * * * and we think the judicial power, as originally given, extends to all cases arising under the Constitution or a law of the United States, whoever may be the parties."

The fact that a State may make violations of federal guaranties compensable in its own tribunals is not a substitute for a federal remedy. It is intended as an additional remedy that promotes both state and federal purposes. The respondents' contention apparently is that if the State gave no remedy to the petitioners none whatever was available. In short the contention is simply that the federal government is paralyzed, helpless and unable to protect its guaranties.

THE FEDERAL COURTS ARE NOT IMPOTENT.

If the federal judiciary is not fully empowered and competent to defend the constitutional guaranties, either expressly or impliedly, then our federal government is not a system of enforceable law but depends simply upon the moral force of its administrators and society, that is, upon social amenities and tabus. Lenin and Trotsky, accepting the Marx-Engels formula, had a conviction that socialism, ultimately ripening into communism, might be guided by such forces. However, we cannot believe that humanity is yet prepared to accept such notions. If humanity be not prepared how much less then is America. We believe the Federal

Courts are empowered to prevent violations of substantive constitutional provisions and to repair invasions of citizens' rights thereunder by the resort to such types of force as the judicial machinery affords.

The respondents, having acted indiscreetly in their impatience to serve governmental purposes, now assert a right to escape liability for having flouted the Constitution. They argue that Congress has not given jurisdiction to the District Courts to entertain the suit for damages and that the federal judiciary is impotent to redress the wrongs perpetrated. They contend that the petitioners' cause of action does not arise under the Constitution or laws of the United States and that, therefore, the District Court below lacked jurisdiction of the case. They urge that the relief the petitioners seek, if any be available, must necessarily be sought for in a State Court, that is, in the forum of a different sovereign.

We are not persuaded that the judicial branch of the federal government has been so crippled that it is unable to redress wrongs committed by its agents under color of authority. How a State Court could assume jurisdiction over federal officers acting under color of federal authority and in furtherance of federal purposes, albeit in excess of their actual authority, is not apparent. If a State Court does not have power to prevent such acts for want of jurisdiction it would lack power to punish their commission or to compensate those injured for like want of jurisdiction. Attention is also drawn to the fact that neither the Constitution nor Congress has deprived the Federal

Courts of such jurisdiction or delegated jurisdiction to the State Courts. The respondents' argument evidently is that the State may shunt jurisdiction to the Union and the Union to the State. Perhaps they hope the petitioners' rights may be sidetracked by such action and the petitioners be driven mad while searching for the tribunal which might have jurisdiction of the cause.

CONCLUSION.

If our Federal Courts have no jurisdiction to redress violations of the Constitution and the State Courts choose to ignore such violations then the significance of the constitutional guaranties amounts to—nothing. If they refuse to exercise the jurisdiction the Constitution has lodged in them and the Congress has confirmed it is obvious the federal jurisdiction has been whittled down by those to whose charge the preservation of the fundamental rights of citizens has been committed. The doctrine of judicial convenience may be offered as the excuse for the whittling. The remedy, however, does not lie in a refusal to assume and exercise the jurisdiction that resides in the Federal Courts but in seeking congressional relief from the burden of a higher number of cases by requesting the establishment of a higher number of Federal Courts.

Much confusion reigns in the decisions covering the respective jurisdictions of the Federal and State Courts. More reigns in the reported judicial opinions

as to what is and what is not a case arising under the Constitution or laws of the United States. So long as this condition exists so long will the correct jurisdiction be doubtful to litigants whose remedies are involved. They ought not to be placed in a position of uncertainty in the choice of a judicial forum. We urge, therefore, that this Court grant the petition for the writ of certiorari and, upon a review of the case, resolve the doubts thereon by reversing the judgment below.

Dated, San Francisco, California,
October 1, 1945.

Respectfully submitted,
WAYNE M. COLLINS,
Counsel for Amici Curiae.

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SUPREME COURT OF THE UNITED STATES.

No. 344.—October Term, 1945.

Arthur L. Bell, Individually, and as an Associate of and Division Superintendent of "Mankind United," etc., et al., Petitioners,
vs.
R. B. Hood, Theodore Cruise, Philip Bowser, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 1, 1946.]

Mr. Justice Black delivered the opinion of the Court.

Petitioners brought this suit in a federal district court to recover damages in excess of $3000 from the respondents who are agents of the Federal Bureau of Investigation. The complaint alleges that the Court's jurisdiction is founded upon federal questions arising under the Fourth and Fifth Amendments. It is alleged that the damages were suffered as a result of the defendants imprisoning the petitioners in violation of their Constitutional right to be free from deprivation of their liberty without due process of law, and subjecting their premises to search and their possessions to seizure, in violation of their Constitutional right to be free from unreasonable searches and seizures.[1] Re-

[1] The complaint stated in part:

"That on or about the 17th day of December, 1942, defendant R. B. Hood and each of the other defendants, unlawfully conspired with each other to act beyond their authority as said Federal Bureau of Investigation agents and police officers respectively, and agreed that they would abridge the Constitutional rights of the plaintiffs as guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States to be free from the deprivation of liberty and property without due process of law, and to be free from unreasonable searches and seizures, and agreed unlawfully to simultaneously, in the early morning of December 18th, 1942, search the homes of the individual plaintiffs herein without any warrants of search or seizure, and unlawfully to seize the papers, documents and effects of said plaintiffs and of "Mankind United", and falsely to imprison the individual plaintiffs by unlawfully arresting some of the individual plaintiffs without a warrant of arrest and unreasonably to delay the taking of all the individual plaintiffs before a committing officer, in order to effectuate the unlawful searches and seizures aforesaid.

"That thereafter, and on the 18th day of December, 1942, the defendants and each of them, in order to carry out the terms and conditions of the

spondents moved to dismiss the complaint for failure to state a cause of action for which relief could be granted and for summary judgment on the grounds that the federal agents acted within the scope of their authority as officers of the United States and that the searches and seizures were incidental to lawful arrests and were therefore valid. Respondents filed affidavits in support of their motions and petitioners filed counter-affidavits. After hearing the motions the district judge did not pass on them but, on his own motion, dismissed the suit for want of federal jurisdiction on the ground that this action was not one that "... arises under the Constitution or laws of the United States ..." as required by 28 U. S. C. § 1331 (a). The Circuit Court of Appeals affirmed on the same ground. 150 F. 2d 96. At the same time it denied a motion made by petitioners asking it to direct the district court to give petitioners leave to amend their complaint in order to make it still more clearly appear that the action was directly grounded on violations of rights alleged to stem from the Fourth and Fifth Amendments. We granted certiorari because of the importance of the jurisdictional issue involved.

Respondents make the following argument in support of the district court's dismissal of the complaint for want of federal jurisdiction. First, they urge that the complaint states a cause of action for the common law tort of trespass made actionable by state law and that it therefore does not raise questions arising "under the Constitution or laws of the United States." Second, to support this contention, respondents maintain that petitioners could not recover under the Constitution or laws of the United States, since the Constitution does not expressly provide for recovery in money damages for violations of the Fourth and Fifth Amendments and Congress has not enacted a statute that does so provide. A mere reading of the complaint refutes the first contention and, as will be seen, the second one is not decisive on the question of jurisdiction of the federal court.

Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from

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illegal conspiracy aforesaid, and solely for the purpose of carrying out said terms and conditions, did arrest and imprison the individual plaintiffs herein and did search the homes of said plaintiffs, and seize and carry away books, papers and effects of said individual plaintiffs and of said 'Mankind United.'"

"... by reason of the deprivation of ... [their] ... Constitutional rights ... [plaintiffs had] ... suffered damages."

the way it was drawn that petitioners seek recovery squarely on the ground that respondents violated the Fourth and Fifth Amendments. It charges that the respondents conspired to do acts prohibited by these amendments and alleges that respondents' conduct pursuant to the conspiracy resulted in damages in excess of $3,000. It cannot be doubted therefore that it was the pleaders' purpose to make violation of these Constitutional provisions the basis of this suit. Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent "the party who brings a suit is master to decide what law he will rely upon and . . . does determine whether he will bring a 'suit arising under' the [. . . Constitution or laws] of the United States by his declaration or bill." *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25. Though the mere failure to set out the federal or Constitutional claims as specifically as petitioners have done would not always be conclusive against the party bringing the suit, where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit. Thus allegations far less specific than the ones in the complaint before us have been held adequate to show that the matter in controversy arose under the Constitution of the United States. *Wiley* v. *Sinkler*, 179 U. S. 58, 64-65; *Swafford* v. *Templeton*, 185 U. S. 487, 491-492. The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.

Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the

allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. *Swafford* v. *Templeton*, 185 U. S. 487, 493, 494; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 305-308.[2] The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned. *The Fair* v. *Kohler Die Co., supra*, 228 U. S. at 25. But cf. *Swafford* v. *Templeton, supra*.

But as we have already pointed out the alleged violations of the Constitution here are not immaterial but form rather the sole basis of the relief sought. Nor can we say that the cause of action alleged is so patently without merit as to justify, even under the qualifications noted, the court's dismissal for want of jurisdiction. The Circuit Court of Appeals correctly stated that "the complaint states strong cases, and if the allegations have any foundation in truth, the plaintiffs' legal rights have been ruthlessly violated." Petitioners' complaint asserts that the Fourth and Fifth Amendments guarantee their rights to be free from unauthorized and unjustified imprisonment and from unreasonable searches and seizures. They claim that respondents' invasion of these rights caused the damages for which they seek to recover and point further to 28 U. S. C. § 41(1) which authorizes the federal district courts to try "suits of a civil nature" where the matter in controversy "arises under the Constitution or laws of the United States", whether these are suits in "equity" or at "law". Petitioners argue that this statute authorizes the Court to entertain this action at law and to grant recovery for the damages allegedly sustained. Respondents contend that the Constitutional provisions here involved are prohibitions against the federal government as a government and that 28 U. S. C. § 41(1) does not authorize recovery in money damages in suits against unauthorized officials who according to respondents are in the same position as individual trespassers.

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[2] For other cases discussing the distinction between questions going to the merits and those going to the jurisdiction, see the following: Illinois Central Railroad Co. *v.* Adams, 180 U. S. 28; Geneve Furniture Co. *v.* Karpen, 238 U. S. 254; and see Nashville & St. Louis Ry. *v.* Taylor, 86 Fed. 168.

Respondents' contention does not show that petitioners' cause is insubstantial or frivolous, and the complaint does in fact raise serious questions, both of law and fact, which the district court can decide only after it has assumed jurisdiction over the controversy. The issue of law is whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments. That question has never been specifically decided by this Court. That the issue thus raised has sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it can be seen from the cases where this Court has sustained the jurisdiction of the district courts in suits brought to recover damages for depriving a citizen of the right to vote in violation of the Constitution.[3] And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[4] and to restrain individual state officers from doing what the 14th Amendment forbids the state to do.[5] Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.[6] And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.[7] Whether the petitioners are entitled to recover depends upon an interpretation of 28 U. S. C., § 41(1) and on a determination of the scope of the Fourth and Fifth Amendments' protection from unreasonable searches and deprivations of liberty without due process of law. Thus, the right of the petitioners to recover under their complaint will be sustained if

[3] Wiley *v.* Sinkler, *supra;* Swafford *v.* Templeton, *supra.* See also Brickerhouse *v.* Brooks, 165 Fed. 534, 543, in which a similar suit was held to be within the jurisdiction of the federal court.

[4] Philadelphia Co. *v.* Stimson, 223 U. S. 605; Hays *v.* Seattle, 251 U. S. 233; Pennoyer *v.* McConnaughy, 140 U. S. 1; City Railway Co. *v.* Citizens' Railroad Co., 166 U. S. 557; City of Mitchell *v.* Dakota Telephone Co., 246 U. S. 396, 407.

[5] Chicago B. & Q. R. Co. *v.* Chicago, 166 U. S. 226; see also Ex parte Virginia, 100 U. S. 339, 346, 347.

[6] Marbury *v.* Madison, 1 Cranch. 137, 162, 163; Texas & N. O. R. Co. *v.* Ry. & S. S. Clerks, 281 U. S. 548, 569, 570.

[7] See e. g. Dooley *v.* United States, 182 U. S. 222, and cases cited and discussed at 228-230; Board of Commissioners of Jackson County *v.* United States, 308 U. S. 343, 349-350.

the Constitution and laws of the United States are given uniform construction and will be defeated if they are given another. For this reason the district court has jurisdiction. *Gully* v. *First National Bank*, 299 U. S. 109, 112-113; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 199-200.

Reversed.

Mr. Justice REED joins in the opinion and the result. He desires to add to the cases cited in note 7, *Barron* v. *Baltimore*, 7 Pet. 243, and *Burdeau* v. *McDowell*, 256 U. S. 465, 475.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 344.—October Term, 1945.

Arthur L. Bird, Individually, and as an Associate of and Division Superintendent of "Mankind United," et al., Petitioners,
vs.
J. B. Hood, Theodore Cruise, Philip Bowser, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 1, 1946.]

Mr. Chief Justice Stone and Mr. Justice Burton dissenting.

The district court is without jurisdiction as a federal court unless the complaint states a cause of action arising under the Constitution or laws of the United States. Whether the complaint states such a cause of action is for the court, not the pleader, to say. When the provision of the Constitution or federal statute affords a remedy which may in some circumstances be availed of by a plaintiff, the fact that his pleading does not bring him within that class as one entitled to the remedy, goes to the sufficiency of the pleading and not to the jurisdiction. *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 306-308, and cases cited. But where, as here, neither the constitutional provision nor any act of Congress affords a remedy to any person, the mere assertion by a plaintiff that he is entitled to such a remedy cannot be said to satisfy jurisdictional requirements. Hence we think that the courts below rightly decided that the district court was without jurisdiction because no cause of action under the Constitution or laws of the United States was stated.

The only effect of holding, as the Court does, that jurisdiction is conferred by the pleader's unfounded assertion that he is one who can have a remedy for damages arising under the Fourth and Fifth Amendments is to transfer to the federal court the trial of the allegations of trespass to person and property, which state a cause of action arising wholly under state law. For even though it be decided that petitioners have no right to damages under the Constitution, the district court will be required to pass upon the question whether the facts stated by petitioners give rise to a cause of action for trespass under state law. See *Hurn* v. *Oursler*, 289 U. S. 238.